

for the activities formerly governed by NWP 26. See 65 Fed.Reg. at 12,820; see also 67 Fed.Reg. at 2022.

1. Acreage Limitations and PCN Requirements in the NWPs

Initially, Plaintiffs argue that the setting of a 1/2-acre limit on project impacts and a 1/10-acre pre-construction notice ("PCN") requirement in the NWPs, including NWP 39, is arbitrary and capricious, because the Corps did not adequately explain its reasoning behind the implementation of those particulars. (NAHB's Mem. 21–23; NAHB's Suppl. Mem. 5–7; NSSGA's Mem. 23–30; NSSGA's Suppl. Mem. 6–7.) *132 The Court disagrees. The Corps used its expertise to determine that a 1/2-acre limit and a 1/10-acre PCN requirement were the best limitations and requirements to include in the NWPs to ensure that only "minimal adverse environmental effects" were caused in the discharging of pollutants. See 67 Fed.Reg. at 2023–24; see also 65 Fed.Reg. at 12,825–26. The Corps specifically found that the 1/2-acre limit was appropriate and should not be higher because higher acreage limits would result in the "loss of non-wetland waters," 67 Fed.Reg. at 2023, and "[o]pen waters such as streams, ponds, lakes, estuaries, and the oceans, are important components of the overall aquatic environment and provide valuable functions and environmental benefits." *Id.* Indeed, the "NWP program encourages avoidance and minimization of impacts to wetlands, and most project proponents do not request NWP authorization to fill the maximum amount of wetlands under the NWP acreage limits." *Id.* In addition, the average impact of activities authorized under NWP 26 in 1995 was .36 acres. 61 Fed.Reg. at 65,892; see also 65 Fed.Reg. at 12,825 ("the vast majority of activities authorized by NWP 26 are below or slightly above 1/2 acre"). As for the 1/10-acre PCN requirement, the Corps instituted this requirement so that the district engineers could carefully review "activities to ensure that they result in no more than minimal adverse effects on the aquatic environment." 67 Fed.Reg. at 2024. Undoubtedly, requiring permittees to notify the Corps before construction significantly helps the Corps monitor the impact that the activities will have on the aquatic environment.

As this Court has already explained, not setting a national level and refusing to define the term "minimal adverse environmental effect" were reasonable decisions by the

Corps. The Corps has adequately and clearly explained in a reasonable manner why the above requirements were included in the NWPs. See *Motor Vehicle Mfrs.*, 463 U.S. at 43, 103 S.Ct. 2856; see also *Dickson*, 68 F.3d at 1404. Therefore, the Corps did not act arbitrarily or capriciously in enacting these acreage limitations and PCN requirements.

2. Restrictions in the Use of NWPs in 100-year-old Floodplains

[10] Plaintiffs claim that the enactment of GC 26, which "bars the use of certain NWPs in the entire 100-year floodplain below the headwaters and in the floodway of the 100-year floodplain above the headwaters," (NAHB's Mem. 28), is a "half-baked proposal," (*id.* at 29), and, therefore, is contrary to law and violates the APA,¹⁵ (*id.* at 28–31; NAHB's Suppl. Mem. 10–11; NSSGA's Mem. 30–36; NSSGA's Suppl. Mem. 7–9). Specifically, plaintiffs claim that GC 26 violates the "streamlining" principle of Section 404 of the CWA¹⁶ (see NSSGA's Mem. 30–33), that the restrictions exceed the Corps' authority (NSSGA's Mem. 30–36), that the restrictions provide no environmental benefit (*id.*), that the restrictions are not supported by data (NAHB's Suppl. Mem. 10), that they are inconsistent with FEMA requirements (NAHB's Mem. 29; NSSGA's Suppl. Mem. 8–9; NAHB's Suppl. Mem. 10), and that there is no rational connection between the NWPs affected by GC 26 and those that are not (NSSGA's Suppl. Mem. 8).

15 Plaintiffs also claim that the Corps did not provide proper notice of the proposed GC. (NAHB's Mem. 29.) Yet, the Corps clearly provided notice of the GC in its July 21, 1999 Notice of Intent and Request for Comments, 64 Fed.Reg. at 39,348, and its August 9, 2001 Notice of Intent and Request for Comments, 66 Fed.Reg. 42,098. Therefore, plaintiffs' claim of lack of notice to comment as to GC 26 in violation of the APA fails.

16 There is no such "streamlining" principle, and, therefore, plaintiffs' claim on this ground fails. See *supra* note 10. Indeed, the re-issued GC 26 is less burdensome for interested parties. 67 Fed.Reg. 2093–94.

However, GC 26, as issued on January 15, 2002, no longer includes a notification requirement for the use of NWPs 12 and 14 below headwaters and for the use of NWPs 12, 13, 29, 39, 40, 42, 43, and 44 in the flood fringe

above headwaters, no longer requires documentation that the project meets FEMA-approved requirements, and no longer subjects certain NWP to GC 26. *Compare* 65 Fed.Reg. at 12,897 with 67 Fed.Reg. at 2093-94. In addition, the Corps adequately explained changes made to the GC which include: 1) why the GC would use the 100-year floodplains identified by Flood Insurance Rate Maps or FEMA-approved local floodplain maps, 67 Fed.Reg. at 2072; 2) how GC 26 reinforces the "FEMA program to minimize impacts to flood plains," *id.* at 2073; 3) how GC 26 will strengthen floodplain policy and "reduce flood damages" as the Corps is "very concerned with the loss of life and property resulting from unwise development in the floodplain," *id.*; and 4) why the prohibitions outlined in GC 26 were removed from certain NWPs, *id.*

As for the claim that GC 26 is inconsistent with FEMA regulations, GC 26 requires permittees "to comply with the appropriate FEMA or FEMA approved local floodplain construction requirements," which they would have to follow regardless. 65 Fed.Reg. at 12,879. Therefore, GC 26 does not create an inconsistency or provide FEMA with a "veto power" over projects. As the Corps has adequately explained its rational for enacting GC 26, the Corps has not acted arbitrary or capriciously or contrary to law. *See Motor Vehicle Mfrs.*, 463 U.S. at 43, 103 S.Ct. 2856; *see also Dickson*, 68 F.3d at 1404. Accordingly, plaintiffs' claims relating to the 100-year floodplains fail.

3. Mitigation Through the Creation of Vegetated Buffers

[11] Next, plaintiffs claim that the vegetated buffer mitigation requirement in certain NWPs and GCs exceeds the Corps' authority as the regulation does not relate to the effects of the discharge being permitted. (NAHB's Mem. 37-38; NSSGA's Mem. 38-40; NAHB's Suppl. Mem. 12-14; NSSGA's Suppl. Mem. 9.) The Corps counters that the vegetated buffer mitigation is reasonably related to the discharge of dredged and fill material. (Corps' Mem. 53-55; Corps' Suppl. Mem. 17-19.) The Court agrees with the Corps.

As stated in *United States v. Mango*, "permit conditions are valid if they are reasonably related to the discharge, whether directly or indirectly." 199 F.3d 85, 93 (2d Cir.1999) (remanding to the district court for consideration of whether the conditions imposed were reasonably related to the discharge). Indeed, the Corps

stated that "all mitigation, whether vegetated buffers or wetlands mitigation, must be related to the impacts authorized." 67 Fed.Reg. at 2066.

The Corps included the creation of vegetated buffers as part of its mitigation efforts because "[t]he Corps believes that vegetated buffers are a critical element of the overall aquatic ecosystem in virtually all watersheds." 67 Fed.Reg. at 2064. In explaining the need for the vegetated buffers, the Corps stated:

Discharges of dredged or fill material into waters of the United States, which the Corps regulates under section 404 of the Clean Water Act, result in the loss of aquatic resource functions and values. The establishment and maintenance of vegetated buffers next to streams and *134 other open waters offsets losses of aquatic resource functions and values and reduces degradation of these aquatic resources.

65 Fed.Reg. at 12,834. As to NWP 29, the vegetated buffers are required to "preclude water quality degradation due to erosion and sedimentation." In addition, vegetated buffers are not always required; they are required when "appropriate and practicable." 61 Fed.Reg. at 2092. Clearly, the requirement to establish and maintain vegetated buffers when practicable is reasonably related to the discharges of dredged or fill material. *Mango*, 199 F.3d at 93. Accordingly, this requirement does not exceed the Corps' authority.

4. Protection of Water Quality

[12] Plaintiffs claim that the Corps lacks the authority to "review state water quality programs" under the CWA and to require permit seekers to submit water quality management plans to the Corps. (NAHB's Mem. 34-36; NSSGA's Mem. 36-38; NAHB's Suppl. Mem. 12-13; NSSGA's Suppl. Mem. 9.) Plaintiffs also claim that GC 9 allows the Corps to "overrule" a State's authority to impose water quality management measures under Section 401 of the CWA. (NSSGA's Suppl. Mem. 9.) The Corps maintains that it holds the authority to enact GC 9, and that Section 401 and 404 of the CWA, when read in conjunction, permit the regulation of water quality impacts by the Corps. (*See* Corps' Mem. 48-51; *see also*

Corps' Suppl. Mem. 17.) The Court finds that the Corps has the statutory authority under the CWA to enact GC 9 as it relates to water quality.

Section 401(a)(1) of the CWA requires that any seeker of a federal license or permit:

shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of [certain sections of the CWA].

33 U.S.C. § 1341(a)(1). Section 401(b) states that "[n]othing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements." 33 U.S.C. § 1341(b). In addition, Section 401(d) states that any limitations or requirements set forth in any state certification that assures compliance with certain sections of the CWA "shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d).

Thus, it is clear from a reading of the relevant statutes that the authority provided to the states to control water quality is not usurped by Section 401 and does not remove the Corps' authority to implement GC 9. Moreover, the purpose of Section 401 is to preserve the authority for the States to set standards that are more stringent than the level of protection afforded in a federal permit, and, therefore, the purpose of this section is to *supplement* not *supplant* the requirements for obtaining a federal permit. Section 401 ensures that state limitations and requirements, as related to water quality, will become part of the federal permit, *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 53 n. 114 (D.C.Cir.1987), and nothing in Section 401 implies that a State's limitations or requirements allows that permit seeker to avoid the NWP-specific requirements to obtain a permit, *id.* Accordingly, because the Corps has the authority to ensure that the

discharging of dredged or *135 fill material causes only minimal adverse environmental effects, *see* 33 U.S.C. § 1344(e)(1), the Corps also has the authority to require that a permit seeker "provide water quality management measures that will ensure that the authorized work does not result in more than minimal degradation of water quality." 67 Fed.Reg. at 2089. Accordingly, plaintiffs' argument fails.

5. Regulation of Aggregate and Hard Rock/Mineral Mining as "Similar in Nature" Activities

[13] Finally, plaintiffs claim that the Corps acted arbitrarily and capriciously by "lumping" together hard rock/mineral mining and aggregate mining as activities that are "similar in nature" under NWP 44. (NSGGA's Mem. 21–22.) Plaintiffs rely on a statement made by the Corps in its July 21, 1999 Notice of Intent and Request for Comments that "[h]ard rock/mineral mining activities have greater potential for more than minimal adverse effects on the aquatic environment than aggregate mining activities." 64 Fed.Reg. at 39,331. The Corps contends that the two mining activities are similar in nature and any difference between the two is accounted for in NWP 44 itself. (Corps' Mem. 60–63.) Again, the Court agrees with the Corps.

The Corps can issue permits pertaining to those activities that produce "discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature." 33 U.S.C. § 1344(e)(1). Indeed, when an agency is not dealing with "precise statutory standards" in making a determination, a "reviewing court[] should give the [agency] broad discretion." *Local 1325, Retail Clerks Int'l Ass'n v. NLRB*, 414 F.2d 1194, 1200 (D.C.Cir.1969) (faced with imprecise standards in making a determination of a bargaining unit, the court found that it would give the Board broad discretion in making such a determination).

As to the issuance of NWPs, it is clear that there are not precise standards for what constitute activities that are similar in nature. However, both of the activities at issue here are forms of mining and are governed by NWP 44 which is titled "Mining Activities." 67 Fed.Reg. at 2091. The Corps has found that hard rock/mineral mining and aggregate mining "are sufficiently similar in nature to warrant issuance of a single NWP." 65 Fed.Reg. at 12,859. Indeed, where the two types of mining differ, the Corps treats the two activities differently. *See* 67 Fed.Reg. at

2088–89. The reasoning behind the grouping of these two activities is also clear. *See Dickson*, 68 F.3d at 1404. While there may be “considerable differences in the impacts” of the two types of mining, *see* 63 Fed.Reg. at 36,054, given the fact that the Corps has broad discretion in sorting activities as similar in nature, *see Local 1325*, 414 F.2d at 1200, the Court finds that the Corps did not act arbitrarily or capriciously in issuing a single NWP for the two activities.¹⁷

¹⁷ Plaintiffs also argue that the Corps acted arbitrarily in the issuance of subsection (j) of NWP 44, which relates to aggregate mining. (NSSGA’s Mem. 40–41.) NWP 44(j) provides that “no aggregate mining can occur within stream beds where average annual flow is greater than 1 cubic foot per second or in waters of the United States within 100 feet of the ordinary high water mark of headwater stream segments where the average annual flow of the stream is greater than 1 cubic foot per second.” 67 Fed.Reg. at 2089. Aggregate mining within lower perennial streams is excluded. *Id.* The Corps claims that the reduction in the scope of the applicable waters under NWP 44 will help cause only minimal adverse environmental effects, 64 Fed.Reg. at 39,330, and that the reduction was in order “to better protect those streams that support fish spawning areas.” *Id.* at 39,331. Based on this explanation and the fact that the Corps explained how certain stream relocation and diversion activities “cause the loss of waters of the United States,” *id.* at 39,333, the Corps has adequately explained this requirement under NWP 44. *See Dickson*, 68 F.3d at 1404. Therefore, the Corps has acted neither arbitrarily nor capriciously.

***136 IV. The Issuance of NWP 29 Was Neither Arbitrary nor Capricious.**

[14] Plaintiffs claim that the NWPs treat similar situations differently with no rational justification.¹⁸ (NAHB’s Mem. 31–32; NAHB’s Suppl. Mem. 11.) Specifically, plaintiffs claim that the Corps fails to articulate its reasoning behind only allowing individual home owners to use NWP 29. (NAHB’s Mem. 31; NAHB’s Suppl. Mem. 11.) The Corps contends that NWP 29 can only be used in the construction of a single family residence by the person who will live in the home, because allowing NWP 29 to be used by contractors and developers will increase the use of NWP 29 and, therefore, increase impact to the environment as a result and that

making such a distinction is within the Corps’ authority. (*See* Corps’ Mem. 65–68.) The Court agrees.

18 It should be noted that the re-issued NWP 14 has “eliminated the distinction between public and private linear transportation crossings” (NAHB’s Suppl. Mem. 11), and, therefore, that element of NAHB’s claim that the Corps treats similar situations differently with no rational justification has been addressed (*see id.*).

Clearly, Section 404 of the CWA allows the Corps to issue general permits that pertain to “discharges of dredged or fill material” that “will have only minimal cumulative adverse effect on the environment.” 33 U.S.C. § 1344(e) (1). In determining that NWP 29 should only apply to residential home owners and not to contractors or developers, the Corps was ensuring that the cumulative effect of the permit would not cause more than minimal adverse environmental effects. The Corps’ reasoning is clear. *See Dickson*, 68 F.3d at 1404. Accordingly, the Corps issued NWP 29 within its authority as stated in Section 404(e)(1) of the CWA.

CONCLUSION

This Court finds that the Corps has not acted arbitrarily, capriciously, or contrary to the law in its issuance and re-issuance of the NWPs and GCs, as the Corps has adequately explained its reasoning behind its issuance of the NWPs and GCs and clearly acted within its authority. Therefore, for the foregoing reasons, the Court GRANTS defendants’ Cross-Motions for Summary Judgment and DENIES plaintiffs’ Motions for Summary Judgment. An appropriate Order will issue with this Memorandum Opinion.

FINAL JUDGMENT

For the reasons set forth in the Memorandum Opinion entered this date, it is, this 29th, day of September 2006, hereby

ORDERED that defendants’ Cross-Motions for Summary Judgment [# 60, # 62] are **GRANTED** and plaintiffs’ Motions for Summary Judgment [# 46, # 47, # 48] are **DENIED**; and it is further

ORDERED the defendant's Motion to Strike Plaintiffs' Revised Proposed Order [# 142] is DENIED as Moot; and it is further

SO ORDERED.

ORDERED that judgment is entered in favor of the defendant, and the case is dismissed.

All Citations

453 F.Supp.2d 116, 63 ERC 2120

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS,)	
)	
Plaintiff,)	
v.)	
)	Case No. 1:00CV00379-RJL
UNITED STATES ARMY CORPS OF ENGINEERS,)	and consolidated cases
FRANCIS J. HARVEY, Secretary of the Army,)	
and LT. GENERAL CARL S. STROCK, Chief of)	
Engineers, United States Army Corps of Engineers,)	
)	
Defendants.)	
_____)	

MOTION FOR PARTIAL CONSENT JUDGMENT

The United States Army Corps of Engineers, Francis J. Harvey, Secretary of the Army, and Lt. General Carl S. Strock, Chief of Engineers (jointly referred to as "the Corps"), the National Association of Home Builders ("NAHB"), and the National Federation of Independent Business ("NFIB"), hereby move the Court to enter a declaratory judgment to resolve all claims pursuant to the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-11, in these consolidated matters. Each of the consolidated cases seeks judicial review of the Corps publication of the Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (Mar. 9, 2000) ("NWPs"). The complaint in *National Federation of Independent Business v. United States Army Corps of Engineers*, Civil Action No. 00-01404-RJL ("NFIB"), asserts only an RFA claim. The complaint in *National Association of Home Builders v. United States Army Corps of Engineers*, Civil Action No. 00-00379-RJL asserts one claim under the RFA, as well as other claims under different statutes. The third case consolidated herein, *National Stone Sand and Gravel Association v. United States Army Corps of Engineers*, Civil Action No. 00-0558-RJL, does not contain an RFA claim.

The United States Court of Appeals for the District of Columbia Circuit, in deciding an appeal in these consolidated actions, held that “the Corps’ issuance of the NWPs constitutes final agency action in the form of a legislative rule” and so is subject to the requirements of the RFA, 5 U.S.C. §§ 604-05. *National Ass’n of Home Builders v. United States Army Corps of Engineers*, 417 F.3d 1272, 1285-86 (D.C. Cir. 2005). In relevant part, the D.C. Circuit reversed this Court’s grant of summary judgment to the Corps on the RFA claims and remanded the matter for further proceedings consistent with the appellate court’s decision. *Id.* at 1289.

The Corps, NFIB, and NAHB believe that the interests of all parties and the Court are best served by resolving the RFA claims without further litigation. Accordingly, these parties request that the Court enter a declaratory judgment incorporating the holding of the D.C. Circuit as a final judgment in *NFIB* and on the RFA claim in *NAHB*. The parties agree that no further remedy is necessary with respect to the NWPs at issue in this matter, which will expire in 2007.

While NFIB asserts only an RFA claim, NAHB has asserted other claims as well. Rule 54(b) allows for the Court to direct entry of final judgment on one of several claims in a matter where there is no just reason for delay in the entry of final judgment. Because NAHB and the Corps have consented to the proposed judgment, there is no reason for delay. Therefore, NAHB and the Corps request that final judgment be entered on the RFA claim in Civil Action Number 1:00CV00379-RJL pursuant to Rule 54(b).

Counsel for plaintiffs in *National Stone Sand and Gravel Association v. United States Army Corps of Engineers*, Civil Action No. 00-0558-RJL does not object to this motion. Counsel for Natural Resources Defense Council (“NRDC”) and Sierra Club, intervenor-defendants in all of these consolidated matters, represents as follows: “Without consenting to any

judgment against NRDC and Sierra Club, without endorsing the characterizations contained in the motion for partial consent judgment and accompanying proposed order, and without waiving any rights. NRDC and Sierra Club do not oppose the relief requested in said motion.”

FOR NATIONAL FEDERATION OF
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Respectfully submitted,

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FOR UNITED STATES ARMY
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January 5, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS.)

Plaintiff.)

v.)

UNITED STATES ARMY CORPS OF ENGINEERS.)

FRANCIS J. HARVEY, Secretary of the Army.)

and LT. GENERAL CARL S. STROCK, Chief of)

Engineers, United States Army Corps of Engineers.)

Defendants.)

Case No. 1:00CV00379-RJL
and consolidated cases

ORDER

Upon consideration of the motion for a consent judgment, it is hereby ordered that the motion is granted. Pursuant to 28 U.S.C. § 2201, the Court declares that the Corps was required to comply with the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-11, before issuing Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (Mar. 9, 2000).

The complaint in *National Federation of Independent Business v. United States Army Corps of Engineers*, Civil Action No. 00-01404-RJL is dismissed with prejudice in its entirety. The RFA claim asserted in *National Association of Home Builders v. United States Army Corps of Engineers*, Civil Action No. 00-00379-RJL is dismissed with prejudice. Pursuant to Fed. R. Civ. P. 54(b), the Court finds that there is no just reason for delay in the entry of final judgment against these defendants on the RFA claim in Civil Action No. 00-00379-RJL and so directs the Clerk of this Court to enter final judgment dismissing all RFA claims against them.

Executed this _____ day of _____, 2006.

HON. RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

741 F.2d 401

United States Court of Appeals,
District of Columbia Circuit.

Stephen THOMPSON, Appellant,

v.

William P. CLARK, Secretary of the Interior, et al.

No. 82-1528.

Argued Jan. 26, 1983.

Decided Aug. 7, 1984.

Independent oil and gas developer challenged validity of final rule promulgated by Secretary of the Interior increasing application and rental fees charged for certain noncompetitive federal oil and gas leases. The United States District Court for the District of Columbia, June L. Green, J., dismissed developer's application for declaratory and injunctive relief, and he appealed. The Court of Appeals, Scalia, Circuit Judge, held that: (1) Regulatory Flexibility Act precluded judicial review of claim that there was insufficient evidence in record to support Interior Department's certification that rule would have no significant economic effect on substantial number of small entities and claim that Department disregarded procedural requirements of the Act, and (2) Department's failure to respond to 1,854 written comments received in course of rule making did not violate section of Administrative Procedure Act, since failure to respond did not demonstrate that agency's decision was not based on consideration of relevant factors.

Judgment affirmed.

West Headnotes (9)

[1] Administrative Law and Procedure

👉 Decisions and Acts Reviewable

Where substantial doubt about congressional intent exists, general presumption favoring judicial review of administrative action is controlling, but that presumption is overcome whenever congressional intent to preclude

judicial review is "fairly discernible" in the detail of the legislative scheme.

2 Cases that cite this headnote

[2] Mines and Minerals

👉 Evidence and fact questions

Express language of Regulatory Flexibility Act precluded judicial review of independent oil and gas developer's claim that there was insufficient evidence in the record to support Interior Department's certification that rule increasing application and rental fees charged for certain noncompetitive federal oil and gas leases would have no significant economic effect on substantial number of small entities and claim that Department disregarded procedural requirements of the Act, primarily by failing to publish requisite succinct statement of reasons which explained certification. 5 U.S.C.A. § 611(a, b).

2 Cases that cite this headnote

[3] Administrative Law and Procedure

👉 Record

Section of Regulatory Flexibility Act providing that when an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of whole record of agency action in connection with review means that reviewing court will consider contents of preliminary or final regulatory flexibility analysis, along with rest of record, in assessing not agency's compliance with Regulatory Flexibility Act, but validity of rule under other provisions of law. 5 U.S.C.A. § 611(b).

5 Cases that cite this headnote

[4] Administrative Law and Procedure

👉 Validity

If data in regulatory flexibility analysis, or data anywhere else in rule-making record, demonstrates that rule constitutes such an unreasonable assessment of social costs and

benefits as to be arbitrary and capricious, rule cannot stand. 5 U.S.C.A. § 706(2)(A).

4 Cases that cite this headnote

[5] **Administrative Law and Procedure**

☞ Validity

Administrative Law and Procedure

☞ Record

A reviewing court should consider regulatory flexibility analysis as part of its overall judgment whether a rule is reasonable and may, in an appropriate case, strike down a rule because of a defect in a flexibility analysis.

2 Cases that cite this headnote

[6] **Administrative Law and Procedure**

☞ Validity

If a defective regulatory flexibility analysis caused an agency to underestimate harm inflicted upon small business to such a degree that, when adjustment is made for the error, harm clearly outweighs claimed benefits of the rule, that rule must be set aside; however, it is set aside not because regulatory flexibility analysis was defective, but because mistaken premise reflected in analysis deprived rule of its required rational support, and thus caused it to violate, not any special obligations imposed by Regulatory Flexibility Act, but general legal requirement of reasoned nonarbitrary decision making. 5 U.S.C.A. §§ 601-612, 706(2)(A).

1 Cases that cite this headnote

[7] **Administrative Law and Procedure**

☞ Validity

Administrative Law and Procedure

☞ Notice and comment, necessity

When an agency decides, rightly or wrongly, with or without compliance with requisite procedures, that it need not prepare a regulatory flexibility analysis as part of rule making, impact of rule upon small entities can be placed at issue in public comments, and agency's failure to make adequate response to

serious alleged deficiencies can be grounds for reversal.

7 Cases that cite this headnote

[8] **Administrative Law and Procedure**

☞ Findings

An agency's failure to respond to comments in course of rule making is significant only insofar as it demonstrates that agency's decision was not based on consideration of relevant factors. 5 U.S.C.A. § 553(c).

19 Cases that cite this headnote

[9] **Mines and Minerals**

☞ Rent and royalties

Department of Interior's failure to respond to 1,854 written comments in response to proposed rule increasing application and rental fee charge for certain noncompetitive federal oil and gas leases did not violate section of Administrative Procedure Act inasmuch as its failure to respond did not demonstrate that its final decision promulgating rule was not based on consideration of relevant factors. 5 U.S.C.A. § 553(c).

13 Cases that cite this headnote

***402 **180** Appeal from the United States District Court for the District of Columbia (Civil Action No. 82-00535).

Attorneys and Law Firms

Charles A. Price, Washington, D.C., for appellant.

Robert L. Klarquist, Atty., Dept. of Justice, Washington, D.C., with whom Edward J. Shawaker, Atty., Dept. of Justice, Washington, D.C., was on brief, for appellees. William E. Hill, Jacques B. Gelin and Peter R. Steenland, Jr., Attys. Dept. of Justice, Washington, D.C., also entered appearances for appellees.

Jere W. Glover, Washington, D.C., for amicus curiae, urging reversal.

Before ROBINSON, Chief Circuit Judge, SCALIA, Circuit Judge, and McGOWAN, Senior Circuit Judge.

Opinion

Opinion for the Court filed by Circuit Judge SCALIA.

SCALIA, Circuit Judge.

Appellant Stephen Thompson, an independent oil and gas developer, seeks review of the District Court's dismissal of his application for declaratory and injunctive relief against the appellees, Secretary William P. Clark and the Department of the Interior. *Thompson v. Watt*, Civ. Action No. 82-0535 (D.D.C. Mar. 17, 1982). In that action appellant challenged the validity of a final rule, promulgated by the Secretary, increasing the application and rental fees charged for certain noncompetitive federal oil and gas leases. The principal question presented on appeal is the scope of judicial review of agency action under the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612 (1982).

I

The Secretary of the Interior ("the Secretary") administers the disposal of federal onshore oil and gas lands (*i.e.*, rights to the oil and gas deposits) under authority delegated to him by the Mineral Lands Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. § 181 *et seq.* (1982), and the Mineral *403 **181 Leasing Act for Acquired Lands, 61 Stat. 913 (1947), as amended, 30 U.S.C. § 351 *et seq.* (1982). The law establishes two basic regimes for allocating onshore oil and gas lands: "competitive leases" with five-year terms, for land located within a known geological structure of a producing oil and gas field, 30 U.S.C. § 226(b), (e); and "noncompetitive leases" with ten-year terms, for other lands, 30 U.S.C. § 226(c), (e). Only the latter is at issue in this case.

The noncompetitive leasing program consists of two subprograms (established by regulation): the so-called "Over-The-Counter" ("OTC") and "Simultaneous Oil and Gas" ("SOG") Offer systems. The former applies to federal lands which have never been previously leased; the latter to lands whose leases have been cancelled, relinquished, terminated or allowed to expire. 43 C.F.R. Subparts 3111, 3112 (1983). OTC leases are made on a

first-come, first-served basis; SOG leases are allocated by lottery. Applications for both must be accompanied by a *nonrefundable* filing fee, and successful applicants pay an annual per acre rental fee.

Filing and rental fees have traditionally been established by regulation, *see, e.g.*, 11 Fed.Reg. 12952, 12953-54, 12960 (1946), with the latter subject to certain statutory minima, *see, e.g.*, 30 U.S.C. § 226(d). Prior to 1981, the filing and rental fees for all noncompetitive leases had been set at \$10 and \$1 per acre, respectively. 43 C.F.R. §§ 3103.1-3, 3103.3-2(a) (1980). As a part of the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 357, Congress established a statutory minimum of \$25 for the filing fee (which the Secretary promptly implemented, *see* 46 Fed.Reg. 45887 (1981)), and directed that any increases above \$25 be established by regulation. 95 Stat. 748, § 1401(d)(1). The Act also instructed the Secretary to report to Congress on the feasibility of raising the rental fee on OTC and SOG leases from the levels which the regulations currently provided. *Id.* at 748-49, § 1401(d)(2). On October 29, 1981, the Department published a Notice of Proposed Rulemaking ("NPRM") to increase the filing fee for all noncompetitive leases from \$25 per application to \$75; and the rental fee for SOG leases from \$1 per acre for each year in the life of the lease to \$1 per acre for each of the first five years and \$3 per acre for each of the last five. 46 Fed.Reg. 53645 (1981).

Sections 603 and 604 of the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 603, 604, require that when an agency proposes (§ 603) and promulgates (§ 604) a rule subject to § 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1982), it shall prepare and make available to the public an initial (§ 603) and final (§ 604) "regulatory flexibility analysis," describing *inter alia* the impact of the rule on small entities. The requirement can be eliminated, however, by the agency head's certification, under § 605(b), that the rule "will not ... have a significant economic impact on a substantial number of small entities."¹ The Director of the Bureau of Land Management certified to this effect, based upon a report prepared by his agency, U.S. Department of the Interior, Bureau of Land Management, *Determination of Effects of Rules* (Oct. 22, 1981), Administrative Record ("A.R.") at 1. The NPRM, which was signed by the Assistant Secretary of the Interior with authority over the Bureau of Land Management, included a statement to the same effect. 46 Fed.Reg. at 53645.²

1 5 U.S.C. § 605(b) provides as follows:

Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register, at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a succinct statement explaining the reasons for such certification, and provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

2 The certification by the Director of the Bureau of Land Management was not published, as § 605(b) requires; the statement by the Assistant Secretary was published, but was not phrased as a certification.

***404 **182** Upon publication of this proposed regulation to increase fees and rentals, the Department received 1,854 written comments, which it considered and purported to summarize in its statement promulgating the final rule on January 20, 1982. 47 Fed.Reg. 2864. This published notice included the Assistant Secretary's statement that the agency had determined the rule would not have a significant economic effect on a substantial number of small entities. On February 19, 1982, the rule became effective; five days later, appellant filed this action in district court for declaratory judgment and injunction, under the venue provision of the Administrative Procedure Act governing cases in which no special statutory review proceeding has been provided, 5 U.S.C. § 703.

In his complaint, appellant alleged in successive counts that appellees (1) had violated § 558(b) of the Administrative Procedure Act³ by issuing this regulation in a manner not authorized by § 605(b) of the Regulatory Flexibility Act; (2) had violated § 558(b) of the Administrative Procedure Act by issuing this regulation without compliance with the requirements of § 553(c) of that Act;⁴ and (3) by both of the aforesaid violations, had denied appellant his due process rights under the Fifth Amendment. The District Court dismissed the complaint, concluding that the Department had complied with § 553(c) of the Administrative Procedure Act and that the

court lacked jurisdiction to review compliance with §§ 603–605 of the Regulatory Flexibility Act. The Memorandum Opinion did not separately address appellant's due process claim. Thompson now appeals the denial of his Administrative Procedure Act and Regulatory Flexibility Act claims.

3 5 U.S.C. § 558(b) provides as follows:

A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

4 5 U.S.C. § 553(c) provides, in relevant part, as follows:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

II

Appellant's assertion that appellees failed to comply with § 605(b) of the Regulatory Flexibility Act rests upon two contentions, the first directed to substance and the second to procedure: First, that insufficient evidence exists in the record to support the agency's certification that the regulation will have no significant economic effect on a substantial number of small entities. And second, that appellees have disregarded the procedural requirements of § 605(b), primarily by failing to publish the requisite succinct statement of reasons which explains the certification.

[I] The threshold issue raised by both contentions is whether (or to what extent) judicial review is precluded by the Regulatory Flexibility Act. See 5 U.S.C. § 701(a) (1). As the Supreme Court has most recently expressed the test that guides our inquiry: "[W]here substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling," but that presumption is overcome whenever "congressional intent to preclude judicial review is 'fairly discernible' in the detail of the legislative scheme." *Block v. Community Nutrition Institute*, 467 U.S. 340, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984), quoting *Data Processing Service v. Camp*, 397 U.S. 150, 157, 90 S.Ct. 827, 831, 25 L.Ed.2d 184 (1970).

[2] The express language of the Regulatory Flexibility Act leaves little to the imagination on the issue of judicial review. Section 611 provides as follows:

(a) Except as otherwise provided in subsection (b), any determination by an *405 **183 agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review.

(b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review.

Section 611(a) is dispositive with respect to appellant's substantive claim. The certification that §§ 603 and 604 do not apply to this rulemaking because the rule will not have a significant economic impact on a substantial number of small entities cannot possibly be understood as anything other than a "determination by an agency concerning the applicability of any of the provisions of this chapter." Similarly, § 611(b) is dispositive with respect to the procedural claim. The alleged failure to publish a statement of reasons as § 605 requires surely calls into question "compliance or noncompliance of the agency with the provisions of this chapter."

[3] [4] [5] [6] Appellant seeks to avoid the plain import of § 611 by raising a "logical dilemma." Appellant's Brief at 12, posed by the last sentence of § 611(b), which makes any regulatory flexibility analysis prepared by an agency part of the record subject to scrutiny on review of the final rule. That, according to appellant, compels the interpretation that Congress intended to prohibit only *interlocutory* review of alleged violations of the Regulatory Flexibility Act; but meant to allow review in connection with judicial examination of the final rule. We do not agree. Even the most subtle and sadistic of draftsmen would not choose to convey the plain notion that review of compliance with the Regulatory Flexibility Act is available only in connection with a challenge to the final rule by saying that review is unavailable, but the regulatory flexibility analysis becomes part of the record when the final rule is appealed. The last

sentence of § 611(b) means that the reviewing court will consider the contents of the preliminary or final regulatory flexibility analysis, along with the rest of the record, in assessing not the agency's compliance with the Regulatory Flexibility Act, but the validity of the rule under other provisions of law. Thus, if data in the regulatory flexibility analysis—or data anywhere else in the rulemaking record—demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, 5 U.S.C. § 706(2)(A), the rule cannot stand. Moreover, as we said in *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983), a defective regulatory flexibility analysis "may lead a court to conclude that the rule is unreasonable," *id.* at 538 (emphasis added), and "a reviewing court should consider the regulatory flexibility analysis as part of its overall judgment whether a rule is reasonable and may, in an appropriate case, strike down a rule because of a defect in the flexibility analysis," *id.* at 539 (emphasis added). For example, if a defective regulatory flexibility analysis caused an agency to underestimate the harm inflicted upon small business to such a degree that, when adjustment is made for the error, that harm clearly outweighs the claimed benefits of the rule, then the rule must be set aside. It is set aside, however, *not* because the regulatory flexibility analysis was defective, but because the mistaken premise reflected in the regulatory flexibility analysis deprives the rule of its required rational support, and thus causes it to violate—not any special obligations imposed by the Regulatory Flexibility Act—but the general legal requirement of reasoned, nonarbitrary decisionmaking, 5 U.S.C. § 706(2)

5 In *Sargent v. Block*, 576 F.Supp. 882, 893 (D.D.C. 1983), the district court appears to have misinterpreted our *Small Refiner* opinion, though without any effect upon the outcome since no failure to comply with the Regulatory Flexibility Act was found. Compliance with the Act should not have been reviewed.

*406 **184 The appellant and amicus would resort to the legislative history of the Act for clarification, where they think to find support for their interpretation. Although we find it unnecessary to consider the legislative history in light of the unambiguous language precluding judicial review, see *United States v. Oregon*, 366 U.S. 643, 648, 81 S.Ct. 1278, 1280, 6 L.Ed.2d 575 (1961), we

note that, far from supporting appellant's interpretation, it confirms our analysis.

The immediate antecedents of the Regulatory Flexibility Act were H.R. 4660, 96th Cong., 1st Sess. (1979), and S. 299, 96th Cong., 2d Sess. (1980), as reported out by the Senate Judiciary Committee, 126 CONG.REC. 21,448-49 (1980). Neither of those bills restricted judicial review of agency compliance with the Act, *see* H.R.Rep. No. 519, 96th Cong., 1st Sess. 11-12 (1979); S.Rep. No. 878, 96th Cong., 2d Sess. 9-10 (1980), U.S.Code Cong. & Admin.News 1980, p. 2788, and this feature was vigorously opposed by the Administration. The Director of President Carter's Regulatory Council testified that "it is important that any statute not lead to increased litigation," and that "[n]o provision should change the substantive statutory standards for rules or create new grounds for dilatory legal challenges." *Regulatory Reform: Hearings on S. 104, S. 262, S. 299, S. 755 and S. 1291, Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 5 (Pt. 3) (1979) (statement of Peter J. Petkas). Those bills were rejected by the Senate in favor of a substitute offered by Senator Culver on the floor, *see* 126 CONG.REC. 21,449-51 (1980). The Culver substitute, supported by the Administration, *see* 126 CONG.REC. 21,452 (1980) (letter of support from Chief Counsel for Advocacy for Small Business); President's Statement on Senate Approval of S. 299, 16 WEEKLY COMP.PRES.DOC. 1508 (Aug. 6, 1980), passed both houses without amendment and constitutes the Act we have before us.

Senator Culver's section-by-section analysis of his substitute—the only authoritative legislative history in the record—contains the following discussion of the judicial review provision:

Section 611(a) states that agency determinations concerning whether the provisions of the bill apply to any action by the agency—including a decision by the agency head to certify that a rule will not have a significant economic effect on small entities—shall not be subject to judicial review [I]t is clearly stated that neither the regulatory flexibility analyses themselves (required by Sections 603 and 604) nor agency compliance or noncompliance with the provisions of this subchapter shall be subject to judicial review, either pursuant to this act, or section 706 (2)(D) of this title, or any other provision of law.

Section 611(b) provides that the contents of the regulatory flexibility analysis shall, to the extent relevant to an issue before the court, be available to and considered by a court when the court is determining the validity of the rule which is the subject of the analysis.

126 CONG.REC. 21,457 (1980). Speaking more specifically to the narrow aspect of reviewability immediately involved in the present case, Senator Culver's report said the following:

This means, for example, that the decision by an agency with respect to what proposed rules would have a significant economic impact on a substantial number of small entities pursuant to Section 605(b) shall not be subject to judicial review. Thus, the decision regarding when the agency shall conduct a regulatory flexibility analysis remains in the sole discretion of the agency.

126 CONG.REC. 21,460-61 (1980).

In opposition to this analysis, which is as clear as the language of the statute itself, amicus relies upon various statements made by individual Members of Congress on the House floor. We have examined the *407 **185 record of the House debate and find that all except one of the statements that purportedly support the principle of judicial review in fact do little except track or paraphrase the statutory language (particularly the provision that the regulatory flexibility analysis "shall constitute part of the whole record of agency action in connection with ... review" of the rule)—and accompany that recital with an assertion that this prevents interlocutory appeals (which, under any view of the matter, it unquestionably does) or with a triumphal pronouncement that this is a vindication of judicial oversight. *See, e.g.*, 126 CONG.REC. 24,579 (1980) (statement of Rep. Kastenmeier); *id.* at 24,581 (statement of Rep. Bedell). Only one statement goes beyond such uninformative generalization to an assertion that flatly contradicts the analysis we have set forth above: Representative McDade said that if an agency erroneously concludes there is no significant impact on small entities "it is the intent of our committee that the court[s] should strike down the regulation." 126 CONG.REC. 24,583

(1980). McDade, like almost all of those who made floor remarks favoring judicial oversight of compliance with the Regulatory Flexibility Act, was a member of the Small Business Committee which had unanimously endorsed the rejected H.R. 4660, which did not prohibit judicial review. On the point at issue here, his characterization of the effect of the legislation is not reliable. *See American Trucking Associations v. ICC*, 659 F.2d 452, 459 (5th Cir.1981) (need for caution in relying on legislative commentary, some of which is designed to impress constituents or influence judicial interpretation); *accord*, *National Small Shipments v. CAB*, 618 F.2d 819, 828 (D.C.Cir.1980). Representative Danielson, whose Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee had considered comprehensive regulatory reform legislation, was quite aware of the importance of the judicial review issue and of the distortion which members of the Small Business Committee were introducing:

Comment has been made, as to the subject matter of judicial review, to the effect that judicial review is provided for in this bill. I should like to point out that section 611 on page 15 of the bill provides as follows:

[§ 611(a)].

Insofar as there may be Members who feel that judicial review is encompassed within this bill, I trust that the foregoing reference to the language of the bill itself will set that point straight.

126 CONG.REC. 24,590 (1980) (remarks of Rep. Danielson). In the last analysis, we do precisely what Representative Danielson urged his colleagues to do. We rely upon the language of the statute.

The clarity of the statutory text and its legislative history is not beclouded by the sentence of § 608(b) which provides that "[i]f the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect." That sentence is contained within a section entitled "Procedure for waiver or delay of completion," and is meant to describe the consequence that ensues if and when an agency promulgates a rule with a written finding that it is "in response to an emergency that makes timely compliance with the provisions of section 604 ... impracticable," § 608(b). In that situation the emergency

rule "lapses" (but is not invalidated *ab initio*) unless the regulatory flexibility analysis is produced within 180 days. Obviously, some judicial action may be called for in order to pronounce and enforce the "lapse"—but the judicial determination at issue relates not to "compliance or noncompliance" with the Regulatory Flexibility Act, but to the mere fact that the rule was promulgated on an emergency basis and was not followed by a regulatory flexibility analysis within 180 days. To read this provision as applying to all rules, even those not promulgated on an emergency basis under § 608, would create a strange situation in which sanction for failure to publish a regulatory flexibility analysis due upon promulgation will not be *408 **186 imposed so long as an analysis is published half a year later (which is, it may be noted, well past the deadline for appeal of agency rulemaking under many statutes, *see, e.g.*, 15 U.S.C. § 1394 (1982) (60 days to review National Highway Traffic Safety Administration motor vehicle safety rules))—and even then the sanction will consist not of invalidation of the rule but of mere lapse, *i.e.*, refusal to extend the agency's six-month free ride. It seems to us clear that operation of the sentence in question is limited to the context of the subsection in which it is contained—issuance of rules on an emergency basis. Its function is not to provide judicial review of failure to complete a regulatory impact analysis, contrary to the clear language of § 611; but to relieve agencies of their (nonreviewable) obligation to complete such analyses with respect to emergency rules of six months' duration.

[7] To say that an agency's compliance with the Regulatory Flexibility Act is not reviewable *as such* is not to say that the agency can ignore with impunity the effect of its rules upon small entities. As noted earlier, when an agency prepares regulatory flexibility analyses pursuant to §§ 603 and 604, the court will consider their contents (including any defects they may contain) "as part of its overall judgment whether a rule is reasonable" under 5 U.S.C. § 553. *Small Refiner Lead Phase-Down Task Force v. EPA*, *supra*, 705 F.2d at 539. Moreover, even when an agency decides (rightly or wrongly, and with or without compliance with the requisite procedures) that it need not prepare regulatory flexibility analyses, the impact of the rule upon small entities can be placed at issue in the public comments, and the agency's failure to make adequate response to serious alleged deficiencies in this regard can of course be grounds for reversal. *See Home Box Office v. FCC*, 567 F.2d 9, 35-36 (D.C.Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89

(1977). Indeed in the present case, the same issues raised by appellant's substantive challenge under the Regulatory Flexibility Act, unreviewable as such, are reviewed here in connection with appellant's claim that the Secretary failed to consider comments in the record regarding the effect of the rule on small entities. It is to that inquiry that we now proceed.

III

Appellant claims that the Department's failure to respond to 1,854 written comments violated its obligation under 5 U.S.C. § 553(c) "to consider all relevant matter submitted by interested persons in connection with [the] rulemaking proceeding." Appellant's Brief at 16. In its promulgation of the final rule the Department acknowledged receipt of the comments, but concluded after what it said was "careful review" that "[m]ost of the comments were simply a statement of opposition or support," and no "substantive views" or "compelling argument[s] [opposed to] the proposed increases" were presented. 47 Fed.Reg. at 2864. The District Court held that the Department had complied with the requirements of § 553(c) and dismissed the count.

[8] Section 553(c) provides:

[T]he agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

This section has never been interpreted to require the agency to respond to every comment, or to analyse every issue or alternative raised by the comments, no matter how insubstantial. See *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C.Cir.1968). To the contrary, the Supreme Court has emphatically instructed us that:

administrative proceedings should not be a game or a forum to engage in unjustified obstructionism

by making cryptic and obscure reference to matters that "ought to be" considered and then, after *409 **187 failing to do more, to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54, 98 S.Ct. 1197, 1217, 55 L.Ed.2d 460 (1978). The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not "based on a consideration of the relevant factors," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971). See *Home Box Office, supra*, 567 F.2d at 36.

Here the Department clearly identified the reasons for its action in its Notice of Proposed Rulemaking: "a filing fee of \$75 is necessary to ensure the integrity of the leasing system, to decrease casual speculation and to encourage prompt acquisition of leases on Federal lands by those able and anxious to develop [T]he increase in the rental fee will encourage more timely exploration for oil and gas and discourage the holding of large inventories of Federal lands for long periods of time." 46 Fed.Reg. 53645 (1981). Those conclusions were based upon Department studies and the economic theory of lotteries. See Final Regulatory Impact Analysis, A.R. at 37; Affidavit of Abraham Haspel, Addendum to Department of Interior Brief.

None of the comments singled out by appellant as raising substantial issues contained any meaningful analysis or data refuting the agency's conclusions. A few simply denied the validity of the Department's plausible prediction that application fee increases would (by discouraging disguised multiple filings) promote the integrity of the system. The rest either suggested, again without any serious analysis or data, that the Department consider alternatives, such as phasing in fee and rent increases over time and creating a sliding scale of annual rents based on total acreage, or (the vast majority) complained that the increases would drive out small participants and concentrate leases in the hands of large corporations. With regard to the latter point, the Department's analysis supporting the rule (referred to and

made publicly available in the NPRM) noted that most oil and gas developers now acquire their leases, not from the lottery, but in the assignment market—which is composed of land brokers and “casual” speculators who have won leases in the lottery but have no intention of exploiting the land themselves. Far from harming small independent producers, the Department expected the new regulation to help them, since the higher costs of applying for and holding the leases would drive the “casual” speculators out of the lottery. This would greatly increase the chances of a producer’s obtaining a lease directly; and even where the producer himself was not the winner, he would find it cheaper and less time-consuming to deal with land brokers than to locate and bargain with “casual” speculators. See Final Regulatory Impact Analysis 9–10, A.R. at 50–51. None of the comments provided data or analysis to establish, or even asserted, that these benefits would not ensue. To the extent they complained that small casual speculators would be eliminated, they brought to the attention of the agency nothing which it had not already considered. The Department not only did not deny that consequence, but hoped to achieve it, since it viewed its mission as the fostering of oil and gas development rather than oil and gas lease speculation. Some of the


comments asserted that the eliminated casual speculators would include some who were independent producers as well—but that is neither a startling revelation nor (without some statistics contradicting the Department’s estimation that a larger number of *winning* producers would remain) destructive of the Department’s rationale.

[9] While the Department’s statement, in promulgating the final rule, that “no substantive views [had been] presented,” 47 Fed.Reg. at 2864, may have been an exaggeration, it was at least true that nothing had been presented which required some explanation beyond that already contained within the rulemaking record to assure *410 **188 us that “all relevant factors ha[d] been considered.” *Home Box Office, supra*, 567 F.2d at 36. We thus agree with the judgment of the district court that the agency fully complied with the requirements of 5 U.S.C. § 553(c).

Judgment affirmed.

All Citations

741 F.2d 401, 239 U.S.App.D.C. 179

 KeyCite Yellow Flag - Negative Treatment
Distinguished by Gasoline Marketers of Vermont, Inc. v. Agency of Natural Resources, Vt., August 27, 1999

5 F.Supp.2d 9
United States District Court,
District of Columbia.

NORTHWEST MINING ASSOCIATION, Plaintiff,
v.

Bruce BABBITT, Secretary, U.S.
Department of Interior; et al., Defendants.

Civil Action No. 97-1013 (JLG).

May 13, 1998.

Mining association sued Secretary of United States Department of Interior, challenging final rule enacted by Bureau of Land Management (BLM) concerning reclamation of mining lands. On opposing motions for summary judgment, the District Court, June L. Green, J., held that: (1) association had standing to challenge final rule; (2) final rule's certification violated Regulatory Flexibility Act (RFA) by failing to incorporate correct definition of "small entity"; and (3) remand for further proceedings was appropriate remedy.

Association's motion granted, BLM's motion denied.

West Headnotes (9)

[1] **Mines and Minerals**


 Judicial review

Mining association had standing to assert challenge under Administrative Procedure Act (APA) to final rule enacted by Bureau of Land Management (BLM) concerning reclamation of mining lands, even though association did not submit comments during notice and comment period; nature of association's claims under APA was that there was insufficient notice of altered and additional aspects of final rule given by BLM in its initial proposal, and there was no way association could have submitted comments

regarding interests it was not informed were at stake. 5 U.S.C.A. § 551 et seq.

Cases that cite this headnote


[2] **Associations**

 Actions by or Against Associations

Associational standing applies to rulemaking procedures under Administrative Procedure Act (APA). 5 U.S.C.A. § 551 et seq.

Cases that cite this headnote


[3] **Mines and Minerals**

 Judicial review

Mining association was "small entity" as defined by Regulatory Flexibility Act (RFA), and thus, association had standing under RFA to challenge final rule enacted by Bureau of Land Management (BLM) concerning reclamation of mining lands; BLM did not contest association's assertion that it was independently owned and operated not-for-profit enterprise which was not dominant in its field. 5 U.S.C.A. § 611(a)(1).

1 Cases that cite this headnote

[4] **Administrative Law and Procedure**

 Law questions in general

Courts must show "great deference" under the Administrative Procedure Act (APA) to an agency's interpretation of its own powers and responsibilities. 5 U.S.C.A. § 706(2)(A).

Cases that cite this headnote

[5] **Administrative Law and Procedure**

 Notice and comment, sufficiency

Under the Administrative Procedure Act's (APA) notice and comment requirement, and the APA's basis and purpose requirement, a final rule need not match the rule proposed, and indeed must not if the record demands a change. 5 U.S.C.A. § 553(b, c).

Cases that cite this headnote

[6] Administrative Law and Procedure

— Notice and comment, sufficiency

The test of whether a final rule is significantly different from that originally proposed, and whether the rule thus violates the Administrative Procedure Act (APA), is whether the agency gave notice to interested parties that a different rule might be enacted; adequate notice is given if the final rule is a logical outgrowth of the proposed rule. 5 U.S.C.A. § 553(b, c).

Cases that cite this headnote

[7] Administrative Law and Procedure

— Economic or social impact statement

The Regulatory Flexibility Act (RFA) requires administrative agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. 5 U.S.C.A. § 603(a).

4 Cases that cite this headnote

[8] Mines and Minerals

— Federal Law and Regulations

Final rule enacted by Bureau of Land Management (BLM) concerning reclamation of mining lands violated Regulatory Flexibility Act (RFA), as BLM's certification that final rule would not have significant economic impact on substantial number of small entities did not incorporate correct definition of "small entity;" RFA required BLM to use Small Business Administration's definition of "small entity," which, in case of miners, means 500 or fewer employees, and BLM's use of different definition violated procedure of law demanded by RFA. 5 U.S.C.A. §§ 601(6), 605(b); 13 C.F.R. § 121.201.

3 Cases that cite this headnote

[9] Mines and Minerals

— Judicial review

Remand of final rule enacted by Bureau of Land Management (BLM) concerning reclamation of mining lands was required, as rule's certification, which stated that final rule would not have significant economic impact on substantial number of small entities, violated Regulatory Flexibility Act (RFA) due to certification's failure to incorporate correct definition of "small entity"; continued enforcement of rule was not warranted, as, in order to protect environment against most potentially dangerous mining operations, BLM need only exercise its existing powers between remand and its next final rule promulgation, and new rule's requirements would apparently have large impact on small miners. 5 U.S.C.A. §§ 601(6), 605(b), 611(4) (A, B); 13 C.F.R. § 121.201.

2 Cases that cite this headnote

Attorneys and Law Firms

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***11 MEMORANDUM**

JUNE L. GREEN, District Judge.

This matter is before the Court on opposing motions for summary judgment. The Plaintiff, Northwest Mining Association ("NWMA"), disputes a final rule enacted by Defendant United States Bureau of Land Management ("BLM") concerning reclamation of mining lands. The Small Business Administration ("SBA") submitted an *amicus curiae* brief in favor of NWMA's position. The

Arizona Mining Association and the Nevada Mining Association jointly submitted an *amici curiae* brief, also in favor of NWMA's position. The Court heard oral argument on March 10, 1998. For the reasons that follow, NWMA's motion is granted and the BLM's motion is denied.

I. Background

In 1976, Congress enacted the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701, *et seq.* (1994). Congress declared in the FLPMA that it is the policy of the federal government, through the Secretary of the Interior, to manage public lands "in a manner which recognizes the Nation's need for domestic sources of minerals ... from public lands[.]" 43 U.S.C. § 1701(a)(12).¹ Congress, however, also recognized the need to manage the public lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values[.]" 43 U.S.C. § 1701(a)(8). Accordingly, while managing public lands under the Act, the Secretary and the BLM must "take any action necessary to prevent unnecessary or undue degradation of the lands" by "regulation or otherwise." 43 U.S.C. § 1732(b).

¹ The Secretary is charged "to promulgate rules and regulations to carry out the purposes of [the] Act." 43 U.S.C. § 1740. The administrator of these rules and regulations is the Director of the BLM, through the authority and at the direction of the Secretary. 43 U.S.C. § 1731(a).

The BLM's obligatory duty to prevent unnecessary or undue degradation of public lands has significant application in the mining industry. The extraction of hardrock minerals, such as gold and copper, often involves the excavation of large open pits, the use of toxic chemicals, disruption of underground water, and various other negative environmental effects. Historically, some miners abandoned their claims after the minerals ran out and left the land disturbed. In many cases, the use of millions of dollars of public funds has been required to reclaim such old, abandoned mining operations and return them to an environmentally sound state. (Def. Mem. at 2-3.)

In 1981, the BLM responded to this problem by promulgating regulations, set forth in 43 C.F.R. § 3809,

which allowed it to require bonds from miners in certain situations. Bonding ensures a miner's compliance with environmental standards by proactively funding the reclamation before the operation begins. In the event of a miner's default of its reclamation obligation, the bond, or other surety, will fund the environmental restoration, not the public. (Def. Mem. at 2-3.)

The original regulations defined three levels of mining activities: "casual" level use, where only negligible disturbance of the land results (43 C.F.R. § 3809.0-5(b)); "notice" level use, where mining operations are greater than casual use but still disturb less than five acres per calendar year and where the operator need only submit a general notification of operations to the BLM before commencement (43 C.F.R. § 3809.1-3(a)-(c)); and "plan" level use, where more than five acres per calendar year are disturbed and where the operator must submit a detailed plan of all operations and reclamation to be undertaken to the BLM for approval (43 C.F.R. § 3809.1-9(b)). The original regulations allowed the BLM to require plan level operators to post a bond to ensure the reclamation of disturbed areas, but such bonds were not mandatory to all plan level operations (43 C.F.R. 3809.1-9(b)).

On July 11, 1991, the BLM issued a notice of proposed rulemaking to amend its bonding requirement rules. The proposed rule would require bonds for all mining operations larger than casual level use. 56 Fed.Reg. 31,602 (1991). Notice level operators would be required to post a \$5,000 bond for each claim. *id.* at 31,604, while plan level operators would *12 be required to post a bond in an amount specified by the BLM, but in no case to exceed \$1,000 per acre for explorational operations and \$2,000 per acre for mining operations. *Id.* at 31,605. Additionally, the proposed rule would allow alternative financial instruments to be substituted for bonds, *id.* at 31,602, and would require operators with a history of noncompliance with BLM regulations to file plans on subsequent operations which would normally be conducted on a notice level. *Id.* at 31,602.

The BLM stated that it would accept comments on the proposed rule amendments until September 9, 1991, *id.* at 31,602, but later extended the comment period to October 9, 1991 (56 Fed.Reg. 41,315 (1991)).

On February 28, 1997, almost six years after the original proposal, the BLM issued the final rule. 62 Fed. Reg.

9093 (1997). The final rule contained several substantive differences from the proposed rule which are pertinent to this case. Most notably, notice level and plan level operators are each required by the final rule to post bonds for 100 percent of the estimated reclamation costs. *Id.* at 9100, 9101.

Additionally, the final rule requires notice and plan level operators to employ an outside engineer to calculate and certify the cost of reclamation of the disturbed areas. *id.* at 9100-01, provide bonds for all its existing mining disturbances within ninety days (if not in compliance with the rules). *id.* at 9103, and meet water quality standards for one year at the reclaimed site before the bond would be released. *Id.* at 9102. The final rule imposed criminal sanctions on persons who knowingly violate the regulations. *Id.* at 9103.

The BLM stated that the rule, as enacted, would not have a significant impact on a substantial number of small entities. *Id.* at 9099. The BLM defined "small entity" as "an individual, small firm, or partnership at arm's length from control of any parent companies." *Id.* at 9099.

The NWMA seeks summary judgment under the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* (1994) ("APA") on the basis that there was no notice in the proposed rule of the 100 percent bond requirement, the professional third party engineer requirement, the water quality requirement, or of the potential criminal sanctions.

Alternatively, the NWMA seeks summary judgment under the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601, *et seq.* (1994) (*as amended by* Pub.L. 104-121, Title II, 110 Stat. 864-67 (1996)) on the grounds that, when certifying that the final rule would not have a significant economic impact on a substantial number of small entities, the BLM did not use the Small Business Administration's definition of "small miner" and did not follow the appropriate procedure for adopting an alternate definition as required by the RFA.

The BLM generally denies the NWMA's allegations and itself moves the Court for summary judgment, arguing that the NWMA lacks standing to object. The BLM alleges that, since the NWMA failed to participate in the rulemaking process by filing any comments during the appropriate period, the NWMA lacks standing to challenge the new rule under the APA.² The BLM also

alleges that, because the NWMA is not itself a small entity, it lacks standing to challenge the new rule under the RFA.

- 2 The NWMA asserts that, in fact, it did submit comments, but that its records of such have been lost in the intervening five years. (Pl. Mem. At 12-13, Pl. Reply at 3-7.)

II. Discussion

The Court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A. Standing of the NWMA

The BLM claims that the NWMA does not have standing to object to its final rule under either the APA or the RFA because it did not submit comments during the notice and comment period. The NWMA asserts that it *13 need not have submitted comments because the BLM's original rule proposal did not properly inform it that its interests were at stake. The NWMA further asserts that, in any event, it has associational standing as a representative of its members.

[1] The Plaintiff is correct. The nature of the NWMA's claims under the APA is that there was insufficient notice of the altered and additional aspects of the final rule given by the BLM in its initial proposal. There is no way the NWMA could have submitted comments regarding interests it was not informed were at stake.

[2] The BLM also challenges the NWMA's assertion of associational standing, contending that it does not apply to rulemaking procedures. The BLM does not provide an explanation of why this is so. In *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), and *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), the Supreme Court refined its associational standing doctrine into a three-prong test.

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would

otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Hunt, 432 U.S. at 343, 97 S.Ct. 2434.

The Plaintiff here meets these elements and the Court finds no basis to conclude that rulemaking should be regarded as exempt from this test. Accordingly, the Court finds that the NWMA has standing under the APA to object to the final rule at issue here.

[3] The BLM also claims that the NWMA lacks standing under the Regulatory Flexibility Act because the language of the RFA extends standing to seek judicial review only to a "small entity." The RFA provides that "a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review" 5 U.S.C. § 611(a) (1). Section 601(6) of the RFA states, in relevant part, that the term "small entity" shall have the same meaning as the term "small organization." Section 601(4) states, in relevant part, that the term "small organization" means "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field" Here, the BLM does not contest the NWMA's assertion that it is an independently owned and operated, not-for-profit enterprise which is not dominant in its field. (Pl. Mem. at 34-37.) Therefore, the NWMA is a "small entity" as defined by the RFA and has standing to object.³

³ It is probable that the NWMA would also have standing to object under the RFA based on associational standing, discussed *supra*.

B. Plaintiff's Claims Under the APA

[4] The standard for judicial review of the BLM's actions here is set forth in Section 706 of the APA. The court shall "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, of otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). The Court must show "great deference" to the agency's interpretation of its own powers and responsibilities. *EPA v. National Crushed Stone Ass'n*,

449 U.S. 64, 83, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980) (citation omitted).

[5] [6] The gist of the NWMA's numerous counts under the APA is that the final rule enacted by the BLM is significantly different from that originally proposed. The NWMA alleges that the differences are great enough to constitute abuses of the notice and comment requirement, 5 U.S.C. § 553(b), and the basis and purpose requirement, 5 U.S.C. § 553(c), of the APA. The final rule, however, "need not match the rule proposed [and] indeed must not if the record demands a change." *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C.Cir.1994) (citations omitted). To do otherwise "would lead to the absurdity that ... the agency can learn from the comments on its proposals only at the peril of starting a new round of commentary." *International *14 Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n. 51 (D.C.Cir.1973). The test is whether the agency gave notice to interested parties that a different rule might be enacted. *Kooritzky*, 17 F.3d at 1513. Adequate notice is given if the final rule is a "logical outgrowth" of the proposed rule. *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C.Cir.1991). Therefore, the pertinent question to be asked in this case is whether the BLM's final rule is a logical outgrowth of the proposed rule.

The determination of what rule is a logical outgrowth of another can be a difficult task and require detailed examination of the administrative record. For instance, the NWMA alleges that the minimum bond amounts required by the final rule cannot be a logical outgrowth of the maximum amounts contemplated by the proposed rule. At first blush, this might seem to be one of the NWMA's strongest arguments. An examination of the administrative record reveals that the rule proposal does, indeed, state that bond amounts for plan level operations "would be capped at \$1,000 per acre for exploration activities and \$2,000 for mining activities." 56 Fed.Reg. 31,603. The proposal goes on, however, to state that "[c]omments are specifically requested on the adequacy of these definitions." *Id.*

The request for commentary on the definitions *reasonably* could be construed to include commentary on the adequacy of the dollar amount, which, in turn, *reasonably* could be found to constitute adequate notice that the rule might be changed. It is uncertain whether additional examination of comments received would be indicative of

the adequacy of the notice. It is also uncertain whether testimony at trial might prove dispositive of the issue. In other words, the claim is not readily applied to the summary judgment standard, *i.e.*, that no reasonable factfinder could find for the BLM in this matter.

The Court does not need to conduct such an exhaustive examination of the administrative record to reach the merits of the NWMA's claims under the APA because of the disposition of their claim under the RFA.

C. Plaintiff's Claim Under the Regulatory Flexibility Act

The NWMA's claim under the RFA is that the BLM did not follow the legal procedure required by the RFA when it issued the final rule.

[7] The RFA requires administrative agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. See 5 U.S.C. §§ 601, *et seq.*; *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 118 (3d Cir.1997). See also S.Rep. No. 96-878, at 1-6 (1980). When an agency issues a rulemaking proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" which will "describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a). When issuing a final rule, the administrative agency must also prepare and issue a final regulatory flexibility analysis. 5 U.S.C. § 604(a).

[8] Rather than prepare initial and final regulatory flexibility analyses, the BLM chose to use the exception allowed by Section 605 of the RFA. Section 605 provides:

Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule,

along with a statement providing the factual basis for such certification. The Agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

5 U.S.C. § 605(b).

In a section of the final rule publication entitled "Compliance With Regulatory Flexibility Act," the BLM stated that the final rule "will not have a significant economic impact on a substantial number of small entities." *15 62 Fed.Reg. 9099. The BLM stated that, for the purposes of this certification under the RFA, the term "small entity" is defined as "an individual, small firm, or partnership at arm's length from the control of any parent companies." *Id.* The BLM set forth a short factual basis for the certification. *Id.*

The nature of NWMA's challenge is that the BLM did not use the correct definition of "small entity" (specifically, a small miner) when it made the "no significant impact" certification.

The RFA requires agencies to use the Small Business Administration's definition of small entity. Section 601 of the RFA sets forth, in relevant part, "[f]or the purposes of this chapter ... the term 'small entity' shall have the same meaning as the term 'small business'" 5 U.S.C. § 601(6). The term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, 15 U.S.C. § 632 (1994). 5 U.S.C. § 601(3).

An examination of the Small Business Act reveals that the SBA may "specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of [the Act] or any other Act." 15 U.S.C. § 632(a)(2)(A). The SBA publishes these small business definitions in 13 C.F.R. § 121.201. Division B of section 121.201 provides, in pertinent part, that mining concerns must have 500 or fewer employees to be considered "small." *Id.* Therefore, the standard for "small miner" which the BLM must use when performing an Initial or Final Regulatory Flexibility Analysis or when certifying "no significant impact" is a 500 or fewer employee standard. By using a definition other than the SBA's, the BLM violated the procedure of law mandated by the statute.

The BLM, for its part, argues that it used a subsequent Congressional definition of "small miner" used in recent legislation.⁴ This argument is unconvincing in light of the clearly mandated procedure of the RFA. The definitions section of the RFA uses phrases such as "'small entity' shall have the same meaning ..." and "'small business' has the same meaning ...". 5 U.S.C. § 601 (emphasis added). Words such as these do not leave room for alternate interpretations by the agency. The ultimate expression of legislative intent is, of course, an unambiguously worded statute.

⁴ Specifically, the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, 106 Stat. 1374, 1378-79 (1992). (Def. Mem. at 15-26; Def. Reply at 14-15.)

Insofar as the BLM's certification (*i.e.*, that the final rule would have no significant impact on a substantial number of small entities) was without observance of procedure required by law, the NWMA, as complaining party, is entitled to relief, and this Court, therefore, grants NWMA's motion for summary judgment on these grounds.

D. Relief to be Granted Under the RFA

[9] Section 611 of the RFA, entitled Judicial Review, provides, in pertinent part:

In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter ... including, but not limited to, remanding the rule to the agency, and deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

5 U.S.C. § 611(4)(A)-(B). Consequently, the issue is what the public interest is here.

The BLM, arguing for continued enforcement, warns of potential publicly funded restoration efforts and cites a ten-year old report showing an estimated restoration cost of \$284 million for a parcel of federal land that had been

left unreclaimed. *See generally* GAO/RCED-88-123BR (April 1988).

The Court, however, is unconvinced by such anecdotal evidence. In fact, the Court does not find that much would change should enforcement be discontinued. Large, open-pit mines are already subject to discretionary bond requirements by the BLM as plan level operations. 43 C.F.R. § 3809.1-9(b). Moreover, the BLM admits that it already has in place a policy which requires 100 percent bonding for *all* mining operations which use *16 cyanide or other dangerous leachates. (Def. Mem. at 6, 8; Def. Reply at 8.) In other words, to protect the environment against the most potentially dangerous mining operations, the BLM need only exercise its existing powers between a remand and its next final rule promulgation.

Moreover, the new rule's requirements concerning the amount of regulation on the smaller notice level mining operations, the dollar amounts the BLM can require for all bonds, and the additional procedural expenses incurred by miners when obtaining the bonds, appear to have a large impact on the small miner. Effects on small businesses and industry-wide changes in regulatory expenses, however, are precisely what the procedural safeguards of the RFA and the APA are set in place to address. A claim that the public interest requires an exception to the RFA and APA because of the very interests they protect requires a better showing of threatened societal harm than the BLM has produced here.

Finally, the BLM states that, upon remand, any new rule promulgation will be delayed because Congress has prohibited the BLM from publishing new hardrock mining rule proposals until November 15, 1998.⁵ *See* Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1998, Pub.L. No. 105-83 § 339 (1997). While true, the BLM itself delayed enacting a new rule for roughly nine years after the issuance of the GAO report and five and one-half years after its own rule proposal. The BLM has not explained this delay in light of its alleged urgency. The absence of alacrity by the BLM in this matter convinces the Court that another brief delay will not be contrary to the public interest.

- 5 The BLM did not address this argument in its briefs, nor did it file a post-hearing brief. It mentioned this argument briefly during oral argument only.

III. Conclusion

While recognizing the public interest in preserving the environment, the Court also recognizes the public interest in preserving the rights of parties which are affected by government regulation to be adequately informed when their interests are at stake and to participate in the regulatory process as directed by Congress. For this reason and for the reasons stated in this memorandum, the Court remands the final rule to the BLM for procedures consistent with this opinion. Accordingly, the Plaintiff's motion for summary judgment is granted, and the Defendant's motion for summary judgment is denied. An appropriate Order accompanies this Memorandum.

ORDER

End of Document

For the reasons set forth in the accompanying Memorandum and the entire record in this case, it is by the Court this 13th day of May 1998


ORDERED that Plaintiff Northwest Mining Association's Motion for Summary Judgment is **GRANTED**; it is further

ORDERED that the Defendant's Motion for Summary Judgment is **DENIED**; it is further

ORDERED that the final rule at issue here is remanded to the Defendant for procedures consistent with the attached Memorandum.

All Citations

5 F.Supp.2d 9, 47 ERC 1627

 **KeyCite Yellow Flag - Negative Treatment**
Distinguished by *San Joaquin River Group Authority v. National Marine Fisheries Service*, E.D.Cal., July 19, 2011

995 F.Supp. 1411

United States District Court, M.D. Florida,
Tampa Division.

SOUTHERN OFFSHORE FISHING
ASSOCIATION, et al., Plaintiffs,

v.

William M. DALEY, Defendant.

No. 97-1134-CIV-T-23C.

Feb. 24, 1998.

Coalition of shark fishermen and shark fishing organizations brought action challenging fishery management plan (FMP) imposed for Atlantic sharks by Secretary of Commerce, which established commercial harvest quotas for some species. On cross-motions for summary judgment, the District Court, Merryday, J., held that: (1) claims that Secretary had violated provisions of Magnuson Act requiring consideration of impact to United States fishermen, and traditional fishing patterns, were not nonjusticiable political questions; but (2) allegations that Secretary had failed to act internationally as required by Act were nonjusticiable; (3) Secretary complied with provisions of Act requiring consideration of effects of conservation measures, and management of stocks of fish as a unit; (4) process used in formulating FMP was not arbitrary or capricious; and (5) FMP did not violate National Standards One and Two under Act; but (6) Secretary had failed to comply with requirements of Regulatory Flexibility Act.

Judgment for plaintiffs in part, judgment for defendant in part, and remanded.

West Headnotes (26)

[1] **Administrative Law and Procedure**

 Legislative questions; rule-making

Court's plenary responsibility in connection with challenge to administrative rule under Administrative Procedure Act (APA) is to

review the administrative record, and to apply the law to this record. 5 U.S.C.A. § 551 et seq.

Cases that cite this headnote


[2] **Administrative Law and Procedure**

 Validity

Administrative regulation is invalid under Administrative Procedure Act (APA) if review reveals that agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 5 U.S.C.A. § 706(2)(A).

1 Cases that cite this headnote


[3] **Administrative Law and Procedure**

 Legislative questions; rule-making

Court's role in reviewing challenged administrative regulation under Administrative Procedure Act (APA) is to assure that the agency action was based on a consideration of relevant factors, and that the agency has exercised reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent. 5 U.S.C.A. § 706(2)(A).

Cases that cite this headnote

[4] **Fish**

 Preservation and propagation

Under Magnuson Act, Secretary of Commerce retains broad discretion to promulgate regulations, and warrants cautious deference in matters falling within his studied specialty and concerning which equivocal evidence and genuine scientific debate abound. Magnuson Fishery Conservation and Management Act, § 2 et seq., as amended, 16 U.S.C.A. § 1801 et seq.

4 Cases that cite this headnote

[5] **Fish**

➤ Preservation and propagation

Section of Magnuson Act requiring Secretary of Commerce to comply with specific requirements in connection with preparation and implementation of fishery management plan (FMP) or plan amendment applied to actions of Secretary in adopting FMP establishing commercial harvest quotas for capture of Atlantic sharks. Magnuson Fishery Conservation and Management Act, § 304(g)(1), as amended, 16 U.S.C.A. § 1854(g)(1).

Cases that cite this headnote

[6] **Fish**

➤ Preservation and propagation

Under section of Magnuson Act requiring Secretary of Commerce to comply with specific requirements in preparing and implementing fishery management plan (FMP) or plan amendment, Secretary must evaluate practical experiences under the new plan to enable the judicious formulation of emendations. Magnuson Fishery Conservation and Management Act, § 304(g)(1), as amended, 16 U.S.C.A. § 1854(g)(1).

Cases that cite this headnote

[7] **Fish**

➤ Preservation and propagation

Section of Magnuson Act which states that Secretary of Commerce shall have general responsibility to carry out any fishery management plan (FMP) or amendment that he approves or prepares does not limit effect of separate provision of Act, under which Secretary must meet specific requirements in connection with preparation and implementation of FMP or plan amendment. Magnuson Fishery Conservation and Management Act, §§ 304(g)(1), 305(d), as amended, 16 U.S.C.A. §§ 1854(g)(1), 1855(d).

Cases that cite this headnote

[8] **Statutes**

➤ General and specific terms and provisions;ejusdem generis

Statutes

➤ General and specific statutes

Specific terms in statute prevail over the general in the same or another statute which otherwise might be controlling.

Cases that cite this headnote

[9] **Constitutional Law**

➤ Political Questions

Claims by commercial fishermen that Secretary of Commerce had failed to comply with provisions of Magnuson Act requiring Secretary to evaluate likely effects of conservation and management measures and minimize to extent practicable any disadvantage to United States fishermen, and to take into consideration traditional fishing patterns of fishing vessels, in connection with commercial harvest quotas adopted for sharks under fishery management plan (FMP), were not nonjusticiable political questions: statutes in question neither prescribed agenda or formula for foreign policy, nor otherwise intruded on any government function assigned exclusively to executive branch. Magnuson Fishery Conservation and Management Act, § 304(g)(1)(C), (g)(1)(G)(ii), as amended, 16 U.S.C.A. § 1854(g)(1)(C), (g)(1)(G)(ii).

Cases that cite this headnote

[10] **Constitutional Law**

➤ Foreign policy and national defense

Claims by commercial fishermen that Secretary of Labor had violated provisions of Magnuson Act requiring him to diligently pursue, through international entities, comparable international fishery management measures for migratory species, and promote international conservation

of fish, in connection with commercial harvest quotas adopted for sharks under fishery management plan (FMP), were nonjusticiable political questions; statutes in questions touched directly on subject of negotiations with other countries, which is subject constitutionally assigned to executive branch. Magnuson Fishery Conservation and Management Act, § 304(g)(1)(F), (g)(1)(G)(iii), as amended, 16 U.S.C.A. § 1854(g)(1)(F), (g)(1)(G)(iii).

1 Cases that cite this headnote

[11] **Constitutional Law**

➡ Foreign policy and national defense

Constitutional Law

➡ Foreign policy and national defense

Constitution empowers neither Congress nor the courts to instruct the President and his subordinates when or how to engage in international negotiations.

Cases that cite this headnote

[12] **Constitutional Law**

➡ Nature and scope in general

Constitution commits the negotiation of treaties with foreign nations to the executive branch, and thus, international negotiations, including both their substance and their scheduling, are matters within the textually disposed territory of the executive branch. U.S.C.A. Const. Art. 2, § 2, cl. 2.

Cases that cite this headnote

[13] **Constitutional Law**

➡ Foreign policy and national defense

Matters relating to the conduct of foreign relations are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Cases that cite this headnote

[14] **Fish**

➡ Preservation and propagation

Actions of Secretary of Commerce in connection with fishery management plan (FMP) which established harvest quotas for Atlantic sharks satisfied requirements under Magnuson Act that Secretary seek to form international agreements regarding preservation of fisheries: Secretary was undertaking measures to manage Atlantic sharks on an international scale, including cooperation with international commission, tagging studies, and joint study programs. Magnuson Fishery Conservation and Management Act, § 304(g)(1)(F), (g)(1)(G)(iii), as amended, 16 U.S.C.A. § 1854(g)(1)(F), (g)(1)(G)(iii).

Cases that cite this headnote

[15] **Fish**

➡ Preservation and propagation

Secretary of Commerce acted consistent with provision of Magnuson Act, which requires consideration of likely effects of conservation and management measures on affected fisheries, and minimization of any disadvantage to United States fishermen in relation to foreign competitors, in adopting fishery management plan (FMP) which established quotas for harvesting of Atlantic sharks: due to lack of conclusive information, determining relative disadvantage to American fishermen was difficult if not impossible, and Secretary considered and rejected alternative of closing altogether the United States shark fishery. Magnuson Fishery Conservation and Management Act, § 304(g)(1)(C), as amended, 16 U.S.C.A. § 1854(g)(1)(C).

Cases that cite this headnote

[16] **Fish**

➡ Preservation and propagation

Secretary of Commerce acted consistent with provision of Magnuson Act which requires that, to extent practicable, individual stock of fish should be managed as

a unit, in adopting fishery management plan (FMP) which established quotas for harvesting of Atlantic sharks; due to lack of conclusive information, determining relative disadvantage to American fishermen was difficult if not impossible, and Secretary was pursuing measures to manage sharks on international basis. Magnuson Fishery Conservation and Management Act, § 304(g) (1)(C), as amended, 16 U.S.C.A. § 1854(g)(1) (C).

2 Cases that cite this headnote

[17] **Fish**

➤ Preservation and propagation

Process used by Secretary of Labor in establishing fishery management plan (FMP) for Atlantic sharks pursuant to Magnuson Act, under which harvest quotas were established for some shark varieties, was not arbitrary and capricious, as would render plan invalid under Administrative Procedure Act (APA); record indicated continuing decline in stock of sharks, and while information regarding migration was uncertain, evidence supported attempts to limit shark harvesting. 5 U.S.C.A. § 706(2)(A); Magnuson Fishery Conservation and Management Act, § 2 et seq., as amended, 16 U.S.C.A. § 1801 et seq.

Cases that cite this headnote

[18] **Fish**

➤ Preservation and propagation

Fishery management plan (FMP) for Atlantic sharks adopted by Secretary of Commerce under Magnuson Act, which established harvest quotas for some shark species, did not violate National Standard One of Act, which requires that all conservation and management measures prevent overfishing while achieving, on a continuing basis, the optimum yield for fishing industry; undeveloped science and incomplete data precluded precise standard, and quotas established were consistent with preventing overfishing while awaiting onset of optimum

yield on a continuing basis. Magnuson Fishery Conservation and Management Act, § 301(a)(1), as amended, 16 U.S.C.A. § 1851(a) (1).

2 Cases that cite this headnote

[19] **Fish**

➤ Preservation and propagation

Under National Standard Two of Magnuson Act, which provides that fish conservation and management measures shall be based upon the best scientific information available, Secretary of Commerce must derive his determinations from the sum of pertinent and available information. Magnuson Fishery Conservation and Management Act, § 301(a) (2), as amended, 16 U.S.C.A. § 1851(a)(2).

4 Cases that cite this headnote

[20] **Fish**

➤ Preservation and propagation

Fishery management plan (FMP) for Atlantic sharks adopted by Secretary of Commerce under Magnuson Act, which established harvest quotas for some shark species, did not violate National Standard Two of Act, which requires conservation and management measures to be based on the best scientific information available; while data relied upon did not yield definitive conclusions in many respects, report relied on did indicate that shark stocks were depleting due to insufficiently regulated harvests, and that corrective action was necessary. Magnuson Fishery Conservation and Management Act, § 301(a)(2), as amended, 16 U.S.C.A. § 1851(a) (2).

7 Cases that cite this headnote

[21] **Fish**

➤ Preservation and propagation

Inconclusiveness alone does not preclude Secretary of Commerce from acting based on a thorough consideration of available and relevant data when establishing fishery

management plan (FMP), as required under National Standard Two of Magnuson Act, since difficulties with the data and the nature of the scientific method are expected in managing a resource as elusive as a fishery. Magnuson Fishery Conservation and Management Act, § 301(a)(2), as amended, 16 U.S.C.A. § 1851(a)(2).

3 Cases that cite this headnote

[22] **Fish**

🔑 Preservation and propagation

Certification by National Marine Fishery Service (NMFS) that proposed fishery management plan (FMP) for Atlantic sharks under Magnuson Act was not expected to significantly affect a substantial number of small entities, did not satisfy Regulatory Flexibility Act (RFA), and thus did not provide exemption from requirement under RFA that initial regulatory flexibility analysis be performed; certification concluded, without adequate foundation, that quotas would not significantly affect shark fisheries, and that shark fishermen were quite adaptive with respect to their livelihood. 5 U.S.C.A. § 603; Magnuson Fishery Conservation and Management Act, § 2 et seq., as amended, 16 U.S.C.A. § 1801 et seq.

1 Cases that cite this headnote

[23] **Fish**

🔑 Preservation and propagation

Final regulatory flexibility analysis (RFRA) prepared in connection with proposed fishery management plan (FMP) for Atlantic sharks under Magnuson Act, which established harvest quotas for some species, did not satisfy requirements of Regulatory Flexibility Act (RFA); RFA lacked adequate foundation for its conclusions that quotas would not significantly affect shark fisheries, and that shark fishermen were quite adaptive with respect to their livelihood. 5 U.S.C.A. § 604; Magnuson Fishery Conservation and

Management Act, § 2 et seq., as amended, 16 U.S.C.A. § 1801 et seq.

Cases that cite this headnote

[24] **Administrative Law and Procedure**

🔑 Economic or social impact statement

While Regulatory Flexibility Act (RFA) does not require mechanical exactitude, it compels administrative agency to make a reasonable, good-faith effort, prior to issuance of a final rule, to inform the public about potential adverse effects of proposals and about less harmful alternatives. 5 U.S.C.A. § 601 et seq.

Cases that cite this headnote

[25] **Administrative Law and Procedure**

🔑 Remand

Regulatory Flexibility Act (RFA) affords considerable discretion in formulating an appropriate remedy for failure of administrative agency to comply with RFA's requirements, and in granting relief for a violation, a court may take corrective action which includes remanding the rule to the agency and deferring enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest. 5 U.S.C.A. § 611(a)(4).

Cases that cite this headnote

[26] **Fish**

🔑 Preservation and propagation

Appropriate remedy for lack of compliance by Secretary of Commerce with requirements of Regulatory Flexibility Act (RFA) in connection with promulgation of fishery management plan (FMP) for Atlantic sharks, under Magnuson Act, which established harvest quotas for some species, and for Secretary's violation of provisions of Magnuson Act in promulgating rule, was remand with instructions to undertake rational consideration of economic effects and potential alternatives to quotas. 5 U.S.C.A. § 611(a)(4); Magnuson Fishery Conservation

and Management Act, § 2 et seq., as amended.

16 U.S.C.A. § 1801 et seq.

1 Cases that cite this headnote

Attorneys and Law Firms

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Mark A. Brown, Wildlife & Marine Resources Section, Environment & Natural Resources Div., Washington, DC, Mariam McCall, NOAA GCF, Silver Spring, MD, for William M. Daley, Secretary of Commerce.

Cody Fowler Davis, Macfarlane, Ferguson & McMullen, Tampa, FL, Colin C. Deihl, Dawn McKnight, Mark Hughes, Earthlaw, University of Denver School of Law, Foote Law, Denver, CO, for Center for Marine Conservation, National Audubon Society, Inc., Natural Resources Defense Council, Inc., Biodiversity Legal Foundation, Amici Curiae.

ORDER

MERRYDAY, District Judge.

The plaintiffs, a coalition of shark fishermen and shark fishing organizations, challenge the 1997 commercial harvest quotas imposed by the United States Secretary of Commerce and his designees ("Secretary") for the capture of Atlantic sharks currently under federal management. The plaintiffs allege that the administrative decision is unsupported by the record and is contrary to law. I conclude that the Secretary acted within his regulatory discretion in setting the quotas but failed to conduct a proper analysis to determine the quotas' economic effect on small businesses.

The Atlantic Shark Fishery

At least 73 shark species inhabit the Atlantic coast of the United States, the Gulf of Mexico, and the Caribbean Sea. U.S. fishermen harvest (the prevalent euphemism for commercial and sports fishing) sharks both recreationally and commercially. Although small, localized shark fisheries have existed along all U.S. coasts for many years, shark fishing has increased in recent years as domestic and international markets expanded *pari passu* with increases in demand for sundry shark products, including fins, meat, and hides. In the 1970's and 1980's the U.S. government actively promoted commercial exploitation of the Atlantic shark fishery. The government's objective was to develop a presumably "underutilized resource" and to relieve the acute fishing pressure on more commercially popular fish stocks. Fishermen, including some of the individual plaintiffs in this case, undertook commercial shark fishing in the 1980's as a result of the government's promotional efforts.

"Directed shark fishing vessels"—boats purchased, equipped, and operated chiefly for commercial shark fishing—are usually small (45 feet or less in length) compared to typical commercial fishing vessels. The shark fishery became a "small boat" fishery when in 1994 the imposition of a strict 4,000 pound per trip limit rendered fishing by larger vessels economically unfeasible. Often owned and operated by individuals, directed vessels are sailed by small crews, yield only frail profits, and venture into U.S. waters only. A few self-employed fishermen, including *1416 some parties to this case, devote a large portion of their commercial efforts to the capture of Atlantic shark species, especially large coastal sharks. Other vessels harvest sharks as an incident to their pursuit of other Atlantic migratory species, including tuna and swordfish. Unlike the directed shark vessels, the larger, oceanic vessels range far beyond U.S. waters.

In February, 1997, 1,598 U.S. vessels were licensed to commercially harvest sharks in the Atlantic Ocean and the Gulf of Mexico. Recent increases in commercial shark fishing have not decreased the popularity of recreational shark fishing, a venturesome, rigorous, and often competitive diversion for some sportsmen.

Before July, 1993, most data on shark landings were submitted voluntarily to the Secretary and to states

by fishermen who recorded the weight of dressed carcass and average prices of sharks purchased by seafood dealers.¹ Other sources of commercial catch data included voluntary logbooks that recorded the dressed weight of individual fish. Estimates of commercial landings were based on the number of boats identified as targeting coastal sharks. Further, telephone interviews and surveys of anglers at selected fishing sites provided data on recreational shark fishing.

Because the heads, entrails, and fins are typically removed at sea, shore-side landing data fail to provide the individual length, sex, approximate age, or species composing each catch.

U.S. fishermen share the Atlantic shark resource with fishermen from Mexico, Cuba, Nicaragua, and other countries bordering the Gulf of Mexico, the Caribbean Sea, and the southwestern waters of the North Atlantic Ocean. Foreign commercial shark fishing into stocks adjoining the U.S. preceded federal government efforts to develop the U.S. commercial shark fishery.

Fishery Management

Through the Magnuson-Stevens Fishery Conservation and Management Act, as recently amended and renamed by the Sustainable Fisheries Act of 1996, 16 U.S.C. §§ 1801, *et seq.* (the "Magnuson Act"), Congress delegated to the Secretary "broad authority to manage and conserve coastal fisheries." *Kramer v. Mosbacher*, 878 F.2d 134, 135 (4th Cir.1989). To assist the Secretary in carrying out specific management and conservation duties, the Magnuson Act created five independent regional fishery management councils. A council's "principal task is to prepare fishery management plans [("plans")] for its area." *Id.* However, the council system is inapplicable to species that the statute considers "highly migratory." The Magnuson Act assigns the responsibility to prepare and implement plans for Atlantic sharks, as "highly migratory species," exclusively to the Secretary. 16 U.S.C. § 1854(g).

The Secretary's authority and discretion with respect to the management of Atlantic sharks are not unfettered. In preparing, amending, and implementing an FMP under the Magnuson Act, the Secretary must consider various competing factors aimed at promoting conservation and protecting the fishing industry. *See* 16 U.S.C. § 1854(g)

(1).² *1417 In addition, all of the Secretary's regulatory actions must be consistent with the ten national standards for fishery conservation and management prescribed by § 1851(a), which, like § 1854(g)(1), requires the Secretary to account for competing environmental and economic considerations.³ Finally, the Secretary must also comply with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601, *et seq.* (the "RFA"), which requires an agency in the process of rule-making to consider the effect of the agency's proposed regulation on small enterprises and to prescribe pertinent mitigating measures. Both the Magnuson Act and the RFA provide for judicial review of the Secretary's actions pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.* ("APA"). *See* 16 U.S.C. § 1855(f); 5 U.S.C. § 611(a)(1).

2 Section 1854(g)(1) of the statute prescribes the following relevant considerations:

In preparing and implementing any ... plan or amendment, the Secretary shall—

(C) evaluate the likely effects, if any, of conservation and management measures on participants in the affected fisheries and minimize, to the extent practicable, any disadvantage to United States fishermen in relation to foreign competitors;

(E) review, on a continuing basis (and promptly whenever a recommendation pertaining to fishing for highly migratory species has been made under a relevant international fishery agreement), and revise as appropriate, the conservation and management measures included in the plan;

(F) diligently pursue, through international entities (such as the International Commission for the Conservation of Atlantic Tunas), comparable international fishery management measures with respect to fishing for highly migratory species; and

(G) ensure that conservation and management measures under this subsection—

(i) promote international conservation of the affected fishery;

(ii) take into consideration traditional fishing patterns of fishing vessels of the United States and the operating requirements of the fisheries;

(iii) are fair and equitable in allocating fishing privileges among United States fishermen and do

not have economic allocation as the sole purpose; and
(iv) promote, to the extent practicable, implementation of scientific research programs that include the tagging and release of Atlantic highly migratory species.

3 From among the ten, Section 1851(a) prescribes the following six considerations pertinent to this case:

Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(5) Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(8) Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

On February 25, 1993, the Secretary's designee, the National Marine Fishery Service ("NMFS"), issued the "Fishery Management Plan for Sharks of the Atlantic Ocean" (the "FMP"), governing the Atlantic shark fishery along the U.S. coastline from Texas to New England. A.R. Vol. 1, tab I-1 (FMP, February 25, 1993). After three drafts and an animated public discussion, the

FMP was promulgated by NMFS in accordance with the administrative rule-making process prescribed by 16 U.S.C. § 1855(d). See 50 C.F.R. part 678 (1993)(FMP). Generally, the FMP imposes resource management measures designed to prevent a destructive intensity of shark fishing and to incrementally, but ineluctably, rebuild the shark stock.⁴

4 As a final implementing regulation, the FMP has the force and effect of law. 16 U.S.C. §§ 1854 & 1855.

Of the 73 species of sharks known to inhabit the Atlantic and Gulf coasts of the U.S., 39 commercially exploited species are grouped by the FMP into three classes: large coastal sharks ("LCS"), small coastal sharks ("SCS"), and pelagic sharks.⁵ NMFS manages the three classes of sharks as a *1418 theoretical "management unit" that ranges across state, federal, and international boundaries.

5 LCS include certain species of hammerhead sharks, nurse sharks, and certain species of requiem sharks (including sandbar, blacktip, dusky, silky, spinner, and tiger sharks). See 50 C.F.R. § 678.2(1). SCS comprise angel sharks and bonnethead sharks. SCS also include less commercially utilized species of requiem sharks, including the sharpnose shark species found inshore and in near-shore areas. See 50 C.F.R. § 678.2(2). Pelagic sharks comprise cow sharks, mako sharks, porbeagle sharks, thresher sharks, and certain species of requiem sharks (including blue sharks and oceanic whitetip sharks) that range widely over entire ocean basins. See 50 C.F.R. § 678.2(3).

The three categories of sharks governed by the FMP correspond to classifications based on gear-specific and area-specific fisheries. LCS are targeted primarily by a directed shark longline or gillnet fishery and are also harvested by other gear types and taken as bycatch in other fisheries. Whereas SCS are targeted by rod-and-reel fishermen and also are caught as bycatch in other fisheries including the shrimp fishery. Pelagic sharks are often harvested by longline vessels incidental to tuna and swordfish and are occasionally targeted by commercial fishing vessels in northern areas.

NMFS and shark scientists historically use "catch per unit of effort" ("CPUE") indices to detect decline and growth in stocks. CPUE indices provide an estimate of stock abundance by measuring the amount of fishing effort needed to catch a fish. Based on stock assessments

compiled from existing CPUE data indicating that catches exceeded resource production since 1987, the FMP concludes that LCS are overfished. "Overfished" means "a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis." 16 U.S.C. § 1802(29).⁶ The FMP also determines that SCS and pelagic sharks, while not overfished, are nonetheless fully exploited.

⁶ The Secretary recently issued a report to Congress certifying that LCS (along with other species) are overfished. See Report to Congress pp. 47-48 (defendant's exhibit E); 16 U.S.C. § 1854(e)(1). Pursuant to § 1854(e)(1), the Secretary must now develop, within a year, a management plan to end overfishing and to rebuild LCS within the shortest period of time possible.

The FMP notes that both fish and fishermen migrate. The FMP concludes that, "Many species of sharks migrate beyond U.S. waters and are harvested by foreign nations. It is therefore necessary that the management regime consider transboundary distribution." A.R. Vol. 1, tab I, 1, at 105(FMP). The FMP also states that, "[I]n 1988, Cuba landed about 3,500 [metric tons ("mt")] dressed weight of sharks. Mexico harvested 12,000 mt of sharks in the Gulf of Mexico, and the total U.S. commercial catch was 5,276 mt." *Id.* Reviewing the Atlantic sharks' migratory patterns and the international shark harvest, the FMP concludes that, "To effectively manage sharks throughout their range, cooperation, particularly with Mexico, should be sought through existing conventions and agreements, such as MEXUS-Gulf, International Convention for the Conservation of Atlantic Tunas, and others." *Id.*

To prevent overfishing and stimulate rebuilding of stocks, the FMP creates a comprehensive permitting system and establishes the first commercial catch quotas and recreational bag limits imposed on the fishery. The FMP sets a yearly cap of 2,436 mt for LCS and 580 mt for pelagic sharks. The FMP also requires the uninjured release of sharks captured other than as part of a commercial quota or recreational bag limit. The FMP further bans the unseemly and pernicious practice of "finning" (removing only a shark's fins and discarding the helpless and rudderless shark into the sea, causing inexorable death by starvation or predatory attack) and fixes at zero the total allowable level of fishing by a foreign

flag vessel in the U.S. exclusive economic zone.⁷ See 50 C.F.R. part 678 (1993).

⁷ The exclusive economic zone of the United States is the territorial sea extending 200 nautical miles from the seaward boundary of coastal states.

The FMP also requires data collection to enable NMFS to monitor the extent of shark fishing, adjust future catch quotas, and implement other management measures.⁸ The FMP also compels selected vessel operators *1419 to host NMFS observers and to permit the collection of more detailed data. Also, the FMP imposes reporting requirements on individuals conducting recreational shark fishing tournaments. See 50 C.F.R. part 678 (1993).

⁸ For the first time, NMFS requires all permitted owners or operators of vessels in the shark fishery to maintain "weigh-out sheets" documenting the species, the weight, and the price of catch sold. In addition, NMFS requires selected owners or operators to maintain and submit detailed logbooks documenting the kind and amount of gear used, the time fished, the location fished, and the number of each species caught, landed, and discarded.

Finally, the FMP establishes a "framework regulatory adjustment procedure" allowing timely annual changes to management (such as commercial quotas, trip limits, and recreational bag limits) as better data develop from FMP reporting requirements. A.R. Vol. 1, tab I, 1, at 85-87(FMP). In accordance with the regulatory adjustment procedure, NMFS receives information concerning possible changes in fishery management measures from two scientific sources, the Shark Evaluation Workshop ("SEW") and the Shark Operations Team ("OT"). The SEW and the OT meet annually to provide scientific information and guidance to NMFS and assist the agency in implementing the FMP, including annual quota adjustments.

The SEW convenes to evaluate available data on sharks and consider managerial implications of stock assessment results. NMFS prepares a report that contains the deliberations and conclusions of the SEW. The report, which constitutes the final stock assessment required by the FMP, contributes to the management decisions by NMFS and the Secretary.

The OT is an advisory group that includes staff and members from each of the regional councils and NMFS staff and scientists. The purpose of the OT is to monitor the shark fishery and the effectiveness of the FMP and (through the regulatory adjustment procedure) to recommend necessary adjustments to the management measures. The FMP permits the NMFS to act independently from the recommendations of the OT if NMFS "finds that[,] based on the best available scientific information on the biological condition of the shark resources or economic conditions of the fishery, ... adjustments in the management measures are required." *Id.* at 87. The FMP projected that its management measures would permit LCS stocks to rebuild by five percent each year until the fishery reached maximum sustainable yield ("MSY"), the maximum level of continuously renewable catch. *Id.* at 65. The FMP rejected more aggressive rebuilding goals (e.g., quotas yielding a ten percent annual rebuilding rate) because, at the time, FMP considered unnecessary the short term costs to the commercial fishing industry. As it turns out, the FMP's initial estimates regarding the expected rate and amount of rebuilding were materially optimistic.

The 1993–1996 Quotas

The initial 1993 LCS quota of 2,436 mt contemplated as a target a 43 percent reduction from the estimated 1991 LCS commercial landings of approximately 4,300 mt. In 1994, the Secretary raised the annual LCS quota to 2,570 mt, as prescribed by the FMP. The Secretary maintained the LCS quota at this level in 1995 and 1996. Lacking additional data, the SEW did not convene in 1995. However, NMFS prepared a report essentially repeating the observations and conclusions of the SEW's report for 1994. In deciding to maintain the LCS quota at 2,570 mt from 1994 through 1996, the Secretary examined both scientific and economic considerations pertaining to the LCS fishery and its participants. NMFS decided not to implement the FMP's scheduled LCS quota increases in 1995 and 1996, explaining that the 2,570 mt quota "emerged as the most preferable level, or at least a reasonable compromise between suggestions ranging from a complete closure to a quota increase." A.R. Vol. 1, tab III–7, at 8.

Various factors contributed to NMFS's decision not to implement the planned commercial quota increases. First,

the 1994 SEW noted that LCS stocks may have declined more than previously estimated during the 1970's, the period preceding the development *1420 of the U.S. commercial shark fishery. Second, the SEW observed that commercially prominent sandbar sharks may live longer and reach sexual maturity later than previously believed. In sum, SEW's insights suggested that sandbar shark stocks are incapable of rebuilding as quickly as predicted originally by the FMP. Finally, the SEW produced updated CPUE data that offered no evidence of vibrantly rebuilding stocks.

The Secretary nonetheless opted against a 33–50 percent LCS quota reduction for 1995, concluding that such a limit "would be restrictive for the majority of vessels participating in the shark fishery, and thus would cause financial hardship on vessels already commercially fishing for large coastal sharks and ... could result in increases in fishing effort on other fishery resources." A.R. Vol. 1, tab III–7, at 9. In 1996 the Secretary rejected similar quota reductions for similar reasons. NMFS's Decision Memorandum for the 1996 LCS quota foreshadowed that the upcoming SEW "may provide a scientific basis for setting quotas in 1997 and beyond." A.R. Vol. 1, tab IV, 1, at 3. In recommending the 1994–1995 quota level for 1996, NMFS explained also that "there is no evidence to suggest that a one-year delay in quota reductions will lead to irreversible stock decline for any of the species in the large coastal complex." *Id.*

The 1997 Quota–Setting Process

The Secretary initiated the rule-making process culminating in the 1997 quotas in accordance with the FMP's regulatory adjustment procedure. The 1996 SEW meeting convened in June, 1996, resulting in the 1996 SEW report. A.R. Vol. 2, tab IV–C–3 ("SEW report"). The 1996 SEW report notes that the FMP and its management measures, including the quotas, caused a detectable decline in LCS mortality. For example, the report states that peak recorded U.S. LCS commercial landings predating the FMP were approximately 4,600 mt. By 1995, recorded LCS commercial landings declined by 48 percent from the 1981 recorded level to an estimated 2,570 mt.⁹

- 9 When accounting for unrecorded harvest, U.S. LCS actually declined an estimated 70 percent of pre-FMP levels by 1995.

The 1996 SEW report notes that the reduction in mortality also diminished declines in catch rates for LCS. Of twenty-six species, seven showed "either positive slope estimates or slope estimates which could not be differentiated from zero at a 90 percent significance level," indicating no decrease in stock. A.R. Vol. 2, tab IV-C-3, at 4. In other words, seven species either increased in population or maintained the historical population. On the other hand, nineteen of twenty-six species showed negative trends in catch rates. In total, the most recent CPUE tables provide no assurance that stocks are rebuilding. The 1996 SEW report summarizes the CPUE data as follows:

CPUE observations show relatively large declines from 1970's levels through the late 1980's. However, since that time the CPUE data do not show statistically significant evidence that stocks are either increasing or decreasing.

Id. at 5.

In addition to reviewing updated CPUE data, the 1996 SEW employed a demographic model, a production model, and a so-called maximum likelihood model to assess LCS population levels. The 1996 SEW report explicitly acknowledges that each of these statistical methods features commendable strengths and regrettable weaknesses.¹⁰

- 10 The SEW conducted no new analyses with which to modify quotas for SCS or pelagic sharks.

The demographic model utilizes the life history patterns (including age at reproduction, number of offspring, and survival rates) of various shark species to estimate the inherent capability of shark populations to propagate. Because the demographic model omits historical data on exploitation levels, its utility for assessing current stock status is limited. This limitation is compounded by the demographic model's failure to account *1421 for potential stock fluctuation due to migration of both fish and fishermen. The demographic model evaluates only a population's ability to replenish itself through reproduction.

Nonetheless, the demographic model provides a framework for determining the likely degree of resilience of shark stocks to fishing. Perhaps the most important observation derived from the model is that certain LCS, compared to most other fish species, have noticeably low rates of population increase, which translates into a fragile resilience and exposes the sharks to a threatening vulnerability. Available data from several demographic models suggest that the current or similar shark stock cannot sustain the mortality rates attributed to fishing. A study employing a demographic model for three LCS species notes that "several decades without any exploitation will be required to rebuild these seriously depleted stocks." A.R. Vol. 3, tab IV-C-12.

The production model utilizes the history of shark catches and historical trends in catch rates to assess population, measure mortality rates, and determine benchmarks, such as MSY (the maximum level of continuously renewable catch). The syllogistic theorem driving the model is simply that if catch rates predict fish stocks, then an increasing CPUE equates to an increasing stock and a declining CPUE equates to a diminishing stock.

One disadvantage of the production model approach is the assumption that shark populations are "closed," that is, the important circumstances that positively or negatively affect shark population, including, most notably, migration, are accounted adequately. However, the advantages of employing the production model include the use of current and historical landings data, the availability of longer time series, and inclusion of estimated current stock propagation and mortality rates. Because production models provide estimates of current fishing rates relative to MSY, the models contribute to evaluating the implications of different management measures on stock levels.¹¹

- 11 Production modeling is particularly useful in the instance of sharks because historical catch data for the species are not available. For example, data concerning catch-at-age are difficult to obtain reliably for sharks and are absent from most of the historical catch records. As noted earlier, mandatory reporting and data collection under the FMP began in 1993. The production modeling approach is a common and simple stock assessment model that requires no catch-at-age information. Production modeling also allows scientists to view the available data in terms of the

entire shark catch, rather than considering individual species.

Production modeling concludes that population is markedly below MSY, while mortality rates are markedly above MSY. Catch rate data demonstrate that many of the LCS species declined by more than 50 percent from the early 1970's to the mid 1980's. Declines of this magnitude suggest that the stocks diminished to levels below the MSY. A production study notes that "1995 fishing mortality rates were approximately 1.7 to 2 times that which would produce a maximum sustainable catch in numbers, but slightly lower than those in 1993 when the FMP was implemented." A.R. Vol. 2, tab IV-C-3, at 14. These studies suggest that LCS stocks will continue to decline through 1999 unless catch rates are arrested by at least half.

Given the "exploratory" nature of the analyses, however, in assessing data for the 1996 studies, the production model shows a statistical coefficient of variation of 78 percent.¹² *Id.* Accordingly, the SEW report expresses its production modeling results in very inconclusive terms: "The variation resulting from ... bootstrapping showed that the CV on 1996 stock sizes was about 80% and that one could not show statistically significant differences between the 1996 stock level and any other year's level throughout the time series." *Id.*

¹² The coefficient of variation is a common statistical measure of the dispersion of data and represents the standard deviation divided by the mean, which quotient is multiplied by 100. The standard deviation expresses a range above or below the mean into which an estimate is likely to fall.

*1422 Both the demographic and population models assume "closed" fish populations despite evidence that certain shark species are migratory and that foreign fisheries (including Mexican fisheries) harvest these species. For example, the SEW report cites recent tagging results that document sandbar and other shark species moving from the U.S. to Mexico. The FMP refers to similar studies with similar results.¹³ Nevertheless, the SEW report refuses to significantly discount the "closed" population models, finding existing studies on migration inconclusive and incapable of predicting the extent and effect of migration.

¹³ The FMP reviews tagging studies and concludes that the sandbar shark "has shown north-south movements along the U.S. east coast between Cape Cod and Texas. Sandbar sharks tagged off the northeast coast of the U.S. have traveled across the Florida Straits to Cuba and to Mexican waters as far south as the Yucatan. Some tagged sandbar sharks have traveled almost 5,000 km along the coast of North America." A.R. Vol. 1, Tab I, 1, at 24. The FMP also explains that, "[O]ther species (dusky, blacktip, night, silky, blue, shortfin mako, longfin mako, tiger, whitetip, spinner, and bignose) have also traveled between the U.S. east coast and the Gulf of Mexico." *Id.*

The maximum likelihood estimate method ("MLE") approximates shark abundance and mortality based on catch histories, sampled average weights, and indices of fishing efforts. Unlike other models, the MLE method accounts for migration and assumes no closed population. The SEW projected shark abundance through 1999 by contrasting historical data sets from 1986-1995 and 1994-1995.

Based on the 1986-1995 data, the MLE projects that shark stocks will continue to increase through 1999 even if shark fishing continues at 1995 levels. However, the same analysis based on 1994-1995 data indicates that stocks will decline if shark fishing continues at 1995 levels or even if U.S. shark fishing is prohibited completely. The SEW concludes that the MLE projections differ according to the data set used (*i.e.*, comparing 1986-1995 to 1994-1995), in part, because the pre-1994 data were collected before implementation of FMP's ban of finning and before the FMP's mandatory reporting and data collection requirements, the combination of which renders the earlier data less reliable.¹⁴

¹⁴ Because shark fishermen historically did not land the entire carcass, the pre-FMP data reveals neither the relative sizes nor approximate ages of sharks caught during that period. This lack of information precludes assessment of changes in the relative sizes or ages of sharks caught over time, both of which are indicators of the relative health of shark populations. The SEW report summarized the preference for recent data as follows:

The likelihood method does not demand a long time series of data so it was applied to 1994 and 1995 data only. Statistics for these two years are different from those of previous years

because 1) the discarding of finned sharks at sea was curtailed by regulations thus the reported landings included most of the catch in those two years; 2) the species of sharks landed was recorded both by fish brokers and on mandatory logbooks by fishermen; 3) the number of vessels targeting sharks ("fishing effort") was derived for these two years from lists of shark fishing permit holders and their corresponding landings history rather than from anecdotal information; 4) at sea samples of the sizes and species of sharks caught and landed or discarded were available for those two years.

A.R. Vol. 2, tab IV-C-3, at 15.

The SEW report concludes that FMP management produced no statistically significant evidence that LCS stocks were either increasing or decreasing. The scientific group observes that, even though NMFS already instituted catch limits (the 1995 catch was only 48 percent of the peak estimated catch of 1983), additional reductions in mortality of 50 percent or more are required to stabilize and potentially replenish LCS stocks. The SEW summarizes as follows:

The modeling results and the CPUE trend analyses are consistent given the uncertainties in the basic data. The analyses show declines in abundance through the 1980's with a flat trend in the 1990's. The data did not allow the [Shark Evaluation] Workshop Committee to conclude that the trend since the advent of the FMP was statistically significant either up or down. *1423 A few of the individual CPUE's showed increases in the most recent year as did the 86-95 MLE analysis. Whereas, other CPUE's and the 94-95 MLE analysis (which is less tainted by underreporting of catches) did not. The models are consistent in that they indicate that the ability for Large Coastal shark populations to grow [is] limited. The models also predominately indicate that recovery is more likely to occur with reductions in effective fishing mortality rate of 50% or more.

A.R. Vol. 2, tab IV-C-3, at 20.

After considering the three models, the 1996 SEW participants could agree only that a confounding uncertainty intruded into their scientific exertions:

The evidence is equivocal as to whether rebuilding has been initiated or that the stocks are declining further under the recent catch restrictions. The fishery has been regulated for just three years and since the expected rates of change in shark abundance are low, and our measures of stock abundance are uncertain, sufficient observational data are not yet available to test hypotheses about change in stock size after management measures were implemented.

Id. at 21.

The 1996 meeting of the OT convened in August 27-28, 1996. Although producing no consensus regarding management recommendations, the meeting provoked an energetic debate. OT members reached no general agreement on the conclusions of the SEW report or the report's management implications. Several OT members opposed the SEW's suggested quota reduction due to limitations on the probity of the underlying data and methodological suspicions pervading the modeling employed by the SEW. Others agreed with the conclusions of the SEW and suggested a (pre-emptive) 50 percent or more reduction in commercial quotas and recreational bag limits.

The Proposed Rule

On October 17, 1996, the Biodiversity Legal Foundation ("BLF") filed a petition for rule-making with NMFS. BLF requested that NMFS reduce the 1997 LCS quota by 50 percent and reduce the recreational bag limit to one shark per vessel per day. A.R. Vol. 4, tab IV-I, 10. Some private scientists also strongly advanced LCS quota reductions of 50 percent or more. Of course, the quota reductions for

1997 contemplated by NMFS and the SEW anticipated BLF's submission.

On December 20, 1996, NMFS issued a proposed rule and request for comments on the proposal to reduce the 1997 LCS quota and to reduce the recreational bag limit. 61 Fed.Reg. 67295 (December 20, 1996).¹⁵ The proposed quota reduction was based, in part, on the SEW report, which concludes that overfishing continues to diminish LCS stocks. The NMFS Decision Memorandum explicitly adopted the SEW report's 50 percent LCS quota cut recommendation, stating, "The 1996 SEW final report constitutes the best scientific information available to NMFS management and the final action implements the report's recommendations." A.R. Vol. 5, tab IV-K, 40, at 3.

¹⁵ NMFS specifies in the proposed rule that, although it consulted with members of the OT, the agency acted independently of the OT in accordance with the FMP's regulatory adjustment process.

Accompanying the proposed rule was NMFS's certification, as prescribed by the Regulatory Flexibility Act, 5 U.S.C. §§ 601, *et seq.* (the "RFA"), which is that the quota reduction would cause no significant impact on a substantial number of small enterprises. Therefore, NMFS concluded that the regulatory flexibility analysis, contemplated by the RFA, was not statutorily required.

The proposed rule allowed the standard 30-day public comment period, which concluded on January 24, 1997. In response to requests by parties interested in affording fishery participants actual notice of the proposed regulation, NMFS extended the comment period until February 7, 1997. 62 Fed.Reg. 1872 (January 8, 1997); 62 Fed.Reg. 4239 (January 23, 1997). The agency received *1424 more than 600 written comments from public officials, state environmental agencies, private environmental groups, commercial fishermen (including parties to this action), and other interested citizens.

Comments from the public and from the Small Business Administration included assertions that the proposed rule may significantly injure a substantial number of small businesses. In response to these comments, NMFS prepared a Final Regulatory Flexibility Analysis ("FRFA") pursuant to 5 U.S.C. § 604. A.R. Vol. 5, tab IV-K-34. The FRFA iterates the previous conclusion of NMFS that reducing the commercial quota was not

expected to have a significant impact on a substantial number of small entities. *Compare* A.R. Vol. 5, tab IV-K-21, at 67298 (proposed rule) with A.R. Vol. 5, tab IV-K-23 (draft EA and RIR) with A.R. Vol. 5, tab IV-K-34 (final EA and FRFA). In conducting the FRFA, NMFS estimated that a directed shark fishermen earns at most \$26,426 in gross revenues from the LCS fishery alone. Observing that revenues from shark fishing are typically supplemented by income from fishing on other species, NMFS concluded that:

a reduction in quota should have relatively little impact on commercial shark fishing firms since the season, even if cut by more than half, would not adversely impact other harvesting operations that take up the majority of the fishing season.

A.R. Vol. 5, tab IV-K-34, at 32 (FRFA).

The Final Rule

On April 7, 1997, NMFS issued the final rule, halving the commercial quotas for LCS from 2,570 mt to 1,285 mt, maintaining the quota for pelagic sharks at 580 mt, and establishing for the first time a quota for SCS at 1,760 mt.¹⁶ 62 Fed.Reg. 16648, 16656 (April 7, 1997). The final rule imposes the same commercial quota levels proposed by the Secretary through the published notice of proposed rule-making on December 20, 1996. *See* 61 Fed.Reg. 67295 (December 20, 1996).

¹⁶ The final rule also implements other measures to conserve Atlantic shark stocks, including the reduction of recreational bag limits, the establishment of an exclusively catch-and-release fishery for white sharks, the prohibition of filleting at sea, and species identification by all owners, dealers, and tournament operators.

The LCS quota is divided into semi-annual segments. The LCS quota for the first half of 1997 closed shortly after NMFS published the rule in the Federal Register. The quota for the second half of 1997 closed within weeks after the LCS fishery's resumption on July 1, 1997.

Procedural Background

On May 2, 1997, the plaintiffs timely initiated this action against the Secretary pursuant to the judicial review provisions of the Magnuson Act, 16 U.S.C. § 1855(f); the Regulatory Flexibility Act, 5 U.S.C. § 611(a)(1); and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). On May 28, 1997, the Court granted the parties' joint motion for a scheduling order, requiring completion of briefing on cross-motions for summary judgment by early September, 1997 (Doc. 5). By order dated June 14, 1997, (Doc. 2) the Court granted the plaintiffs' motion for expedited consideration of this case pursuant to 16 U.S.C. § 1855(f)(4).¹⁷ On June 16, 1997, the defendant filed the administrative record with the Court (Doc. 8). On July 16, 1997, a coalition of environmentalists, including the Center for Marine Conservation, the National Audubon Society, the National Resources Defense Counsel, Inc., and the BLF, filed a motion to intervene as parties. Given the unique time constraints of this case and the briefing schedule, the Court denied as untimely the proposed intervenors' motion on August 22, 1997 (Doc. 34).¹⁸ However, to avoid any *1425 possible prejudice, the Court permitted the proposed intervenors to file *amici curiae* briefs for consideration by the Court on any issue presented by the parties.

¹⁷ Section 1855(f)(4) states that, "Upon a motion by the person who files a petition under [the judicial review provisions of the Magnuson Act], the appropriate court shall assign the matter for hearing at the earliest possible date and shall expedite the matter in every possible way."

¹⁸ See *Save Our Springs Alliance v. Babbitt*, 115 F.3d 346 (5th Cir.1997).

The parties filed cross-motions for summary judgment (Docs. 25 and 32) pursuant to the Court's May 28, 1997, expedited scheduling order. Accommodating scheduling conflicts of counsel, the Court held a hearing on the dispositive motions on November 13, 1997, during which counsel for the parties and for *amici curiae* presented argument without time or other limitation.¹⁹

¹⁹ The Court **APPROVES** the parties' stipulation at the hearing to dismiss counts five, ten, eleven, thirteen,

and fourteen of the complaint, and these claims are **DISMISSED** accordingly.

[1] I reviewed the expansive administrative record and the submissions of both the parties and *amici curiae*. I carefully considered the arguments of counsel, noting gratefully the high quality of both the briefing and the argument. Despite the extraordinary yet typical demands of my docket, I have attempted to treat this matter expeditiously yet consistent with the demands of informed deliberation.²⁰

²⁰ My superseding and plenary responsibility "is to review the administrative record and to apply the law to this record." *Associated Fisheries of Maine, Inc. v. Daley*, 954 F.Supp. 383, 385-86 (D.Maine 1997), *aff'd*, 127 F.3d 104 (1st Cir.1997).

Standard of Review

[2] The Magnuson Act requires the Court to apply the standards of review prescribed by the APA at 5 U.S.C. § 706(2)(A)-(D), 16 U.S.C. § 1855(f)(1)(B). In accordance with these standards, a regulation is invalid if demonstrably "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA defeats a regulation if review reveals that:

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

[3] [4] The Court's role is to "assure[] that the agency action was based on a consideration of relevant factors" and that "the agency has exercised reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent." *Environmental Defense Fund v. Costle*, 657 F.2d 275, 283 (D.C.Cir.1981)

(quotations omitted). The Eleventh Circuit recently confirmed that the Court's inquiry must be "searching and careful," although the standard of review remains "narrow." See *Fund for Animals v. Rice*, 85 F.3d 535, 541-42 (11th Cir.1996) (quoting *North Buckhead Civic Ass'n v. Skimmer*, 903 F.2d 1533, 1538-40 (11th Cir.1990)). Of course, the Secretary retains broad discretion to promulgate regulations and warrants cautious deference in matters falling within his studied specialty and concerning which equivocal evidence and genuine scientific debate abound. See *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104 (1st Cir.1997); *Central Arizona Water Conserv. Dist. v. U.S. EPA*, 990 F.2d 1531, 1539 (9th Cir.), cert. denied, 510 U.S. 828, 114 S.Ct. 94, 126 L.Ed.2d 61 (1993).

Counts One, Two, Three, Four, and Nine: § 1854(g) Duties and National Standard Three

In counts one, two, three, and four the plaintiffs allege that the Secretary failed to comply with specific requirements enumerated in 16 U.S.C. § 1854(g)(1), which governs the preparation and implementation of a fishery management plan or plan amendment.²¹ The Secretary argues preliminarily that *1426 § 1854(g)(1) is inapplicable because he acted in accordance with the FMP's regulatory adjustment procedure and the general authority provided by 16 U.S.C. § 1855(d). Section 1855(d) states that, "The Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him."

²¹ More specifically, count one alleges the Secretary did not comply with § 1854(g)(1)(C), which states that the Secretary "shall ... evaluate the likely effects, if any, of conservation and management measures on participants in the affected fisheries and minimize, to the extent practicable, any disadvantage to United States fishermen in relation to foreign competitors." Count two alleges violation of § 1854(g)(1)(F), which mandates that the Secretary "shall ... diligently pursue, through international entities (such as the International Convention for the Conservation of Atlantic Tunas), comparable international fishery management measures with respect to fishing for" Atlantic sharks. In count three, the plaintiffs claim that the Secretary failed to comply with his obligation to "ensure that [his] conservation and management measures ... promote international conservation of

[Atlantic sharks]." § 1854(g)(1)(G)(i). Finally, in count four, the plaintiffs rely on § 1854(g)(1)(G)(ii) to allege that the Secretary failed to "take into consideration traditional fishing patterns of fishing vessels of the United States and the operating requirements of the fisheries."

[5] [6] The Secretary apparently posits that the term "implementation" in § 1854(g)(1) is a constrained, nearly moribund, concept, such that when a fishery management plan is enacted, the Secretary's duties under § 1854(g)(1) conveniently dissipate. However, the Secretary's duties are not merely nominal. The statutory requirements attach and persist through the time the Secretary is "preparing and implementing any ... [fishery management] plan or amendment." *Id.* (emphasis added). In setting the 1997 quotas, the agency stated, "NMFS issues this final rule to *implement* certain measures authorized by the Fishery Management Plan for Sharks of the Atlantic Ocean." 62 Fed.Reg. 16648 (April 7, 1997) (emphasis added). Additionally, the legislative history for the current embodiment of § 1854(g)(1) employs broad terms, applying to "management measures developed under the new section." Presumably, the Secretary must evaluate practical experiences under the new plan to enable the judicious formulation of emendations. See S.Rep. No. 101-414, at 21 (1990), reprinted in 1990 U.S.C.C.A.N. 6276, 6297.

[7] [8] Section 1855(d) provides no exception to § 1854(g)(1). The former provision is an encompassing grant of general regulatory authority extending retrospectively from the Magnuson Act's original enactment in 1976. See Pub.L. No. 94-265, Title III, § 305(g). Congress enacted § 1854(g)(1) in 1990 as a substitute for the overlapping regional councils. Concurrently, Congress granted to the Secretary jurisdiction over Atlantic sharks. See Pub.L. No. 101-627, § 110(b). Section 1855(d)'s general provisions cannot limit § 1854(g)'s specific and subsequently enacted assignment of duties and obligations. "Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29, 77 S.Ct. 787, 1 L.Ed.2d 786 (1957).

[9] The Secretary contends also that the plaintiffs' § 1854(g)(1) claims represent non-justiciable political questions because an adjudication requires the Court to intrude impermissibly into the foreign policy prerogatives

of the President and his designees. With respect to counts one and four of the complaint, I disagree.

In *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court held that an issue is non-justiciable when there is:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving the issue; or the impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious *1427 pronouncements by various departments on one question.

The statutes implicated in counts one and four of the complaint fall comfortably outside the realm of non-justiciability as defined in *Baker*. Count one alleges that the Secretary failed to comply with 16 U.S.C. § 1854(g)(1)(C), which states that the Secretary "shall ... evaluate the likely effects, if any, of conservation and management measures on participants in the affected fisheries and minimize, to the extent practicable, any disadvantage to United States fishermen in relation to foreign competitors." Count four alleges that the Secretary failed to comply with 16 U.S.C. § 1854(g)(1)(G)(ii), which requires the Secretary to "take into consideration traditional fishing patterns of fishing vessels of the United States and the operating requirements of the fisheries." Sections 1854(g)(1)(C) and 1854(g)(1)(G)(ii) neither prescribe an agenda or formula for foreign policy nor otherwise intrude on any government function that the Constitution assigns exclusively to the executive branch. See *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166

(1986). The statutes require the Secretary to pursue only *domestic* action on a subject of *domestic* concern. In this respect, sections 1854(g)(1)(C) and 1854(g)(1)(G)(ii) are no different from other statutes governing the Secretary's fishery management. See, e.g., 16 U.S.C. § 1854(g): 5 U.S.C. §§ 603 and 604. Accordingly, counts one and four are clearly justiciable.²²

22 Count four is substantially addressed in connection with counts twelve, fifteen, and sixteen.

[10] Counts two and three pose more difficult questions. Count two relies on § 1854(g)(1)(F), which requires the Secretary to "diligently pursue, through international entities (such as the International Commission for the Conservation of Atlantic Tunas), comparable international fishery management measures with respect to fishing for highly migratory species." Count three is based on § 1854(f)(1)(G)(i), which requires the Secretary to "promote [the] international conservation" of sharks. The plaintiffs therefore challenge the sufficiency of the Secretary's efforts to pursue international agreements aimed at international fishery management.

[11] [12] [13] [14] Sections 1854(g)(1)(F) and 1854(g)(1)(G)(iii) touch directly on the subject of when and how the U.S. will negotiate with other countries to achieve an international plan for shark management. However, the Constitution empowers neither Congress nor the courts to instruct the President and his subordinates when or how to engage in international negotiations.²³ The Constitution commits the negotiation of treaties with foreign nations to the executive.²⁴ International *1428 negotiations, including both their substance and their scheduling, are matters within the textually disposed territory of the executive branch. "The Judiciary is particularly ill suited to make such decisions, as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986). Further, Sections 1854(g)(1)(F) and 1854(g)(1)(G)(iii) provide no standard for determining whether the statutory mandates are properly implemented by a specialized executive action. Without durable and palpable constitutional guidance, judicial review is disarmed and disabled as a mechanism of decision if asked to engage in electing one from among many of the imponderable options manifest in the enterprise of foreign policy, which

the Constitution sagaciously assigns exclusively to the President and his subordinates in the executive branch. I decline this promiscuous invitation to venture outside the constitutional arrangements. The defendant's motion for summary judgment with respect to counts two and three is granted.²⁵

- 23 In signing the bill containing the Magnuson Act's provisions on Atlantic Highly Migratory Species, P.L. 101-627, codified at 16 U.S.C. § 1854(g)(1)(F)-(G), President George W. Bush stated:

[N]umerous provisions of the Act could be construed to encroach upon the President's authority under the Constitution to conduct foreign relations, including the unfettered conduct of negotiations with foreign nations....

To avoid constitutional questions that might otherwise arise, I will construe all these provisions to be advisory, not mandatory.

Statement by President George W. Bush Upon Signing H.R.2061, 26 Weekly Comp. Pres. Doc.1932 (Nov. 28, 1990)(presidential signing statement), reprinted in 1990 U.S.C.C.A.N. at 6304-1. In signing the 1996 amendments to the Magnuson Act, President William J. Clinton reiterated that, "Under our Constitution, it is the President who articulates the Nation's foreign policy and who determines the timing and subject matter of our negotiations with foreign nations." Statement by President William J. Clinton upon signing S. 39, 32 Weekly Comp. Pres. Doc.2040 (Oct. 14, 1996) (presidential signing statement), reprinted in 1996 U.S.C.C.A.N. at 4120.

- 24 The Constitution explicitly and textually expresses an investment in the President of the "power, by and with the advice and consent of the Senate, to make treaties." U.S. Const. Art. II, § 2, cl. 2. Other constitutional clauses further establish executive power over foreign affairs. See U.S. Const. Art. II, § 1, cl. 1 ("The Executive Power shall be vested in the President"); U.S. Const. Art. II, § 2, cl. 1 ("The President shall be Commander-in-Chief"); U.S. Const. Art. II, § 3 ("[The President] shall receive Ambassadors and other public Ministers"). The Supreme Court repeatedly recognizes "that matters relating 'to the conduct of foreign relations ... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Haig v. Agee*, 453 U.S. 280, 292, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981)(quoting

Haristades v. Shaughnessy, 342 U.S. 580, 589, 72 S.Ct. 512, 96 L.Ed. 586 (1952)).

- 25 The defendant is entitled to this relief even if counts two and three are, contrary to my opinion, justiciable. The Secretary is currently undertaking measures to manage Atlantic sharks on an international scale, including cooperation with the International Commission for the Conservation of Atlantic Tunas and the United Nations Food and Agriculture Organization, tagging studies, and joint programs for study with Mexican scientists. See Supplemental Declaration of Gary Matlock, A.R. Supp., tab IV-N. Although the Secretary's efforts in this regard may come too late and comprise too little, I believe that they satisfy the minimum required by §§ 1854(g)(1)(F) and 1854(g)(1)(G)(iii).

[15] Count one asserts that in issuing 1997 shark quotas the Secretary failed to "evaluate the likely effects, if any, of conservation and management measures on participants in the affected fisheries and minimize, to the extent practicable, any disadvantage to United States fishermen in relation to foreign competitors." 16 U.S.C. § 1854(g)(1)(C). The FMP and the subsequent SEWs, including the 1996 SEW, recognized that certain shark species migrate and that foreign fishermen target domestic shark stocks. But studies on migration are preliminary and scientists have reached no comprehensive conclusions regarding the extent of migration of U.S. shark stocks and of foreign fishing.²⁶ The SEW report proposed additional tagging studies to further develop data on migration. However, absent more conclusive information, determining the relative disadvantage to U.S. fishermen of domestic quota measures is difficult, if not impossible.

- 26 See A.R. Vol. 1, tab I-J, at 24(FMP); Vol.2, tab IV-C-3, at 10 (SEW report); A.R. Supp. Vol. 6, tab IV-M-25 (Dr. Ramon Bonfil, Instituto Nacional de la Pesca, Mexico); A.R. Supp. Vol. 6, tab IV-M-27 (Secretaria Del Medio Ambiente, Recursos Naturales y Pesca "SEMARNAP," Mexico); A.R. Supp., tab IV-M, 26 (Dr. Raul Marin Osorno, Mexico).

[16] Further, the Secretary specifically considered and rejected the alternative of closing altogether the U.S. shark fishery. The Secretary is required to minimize any disadvantage to U.S. fishermen only "to the extent practicable." The Secretary must balance this obligation with his mandate to conserve and rebuild overfished stocks. 16 U.S.C. § 1854(g)(1)(C). I do not

believe Congress intended the Secretary to suspend his conservation and management obligations whenever fish stocks become lethally subject to both foreign and domestic harvest. *National Fisheries Institute v. Mosbacher*, 732 F.Supp. 210, 222 (D.D.C.1990). In enacting the Magnuson Act, Congress recognized the "danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented." 16 U.S.C. § 1801(a)(4). Accordingly, I conclude that *1429 the Secretary acted consistently with 16 U.S.C. § 1854(g)(1)(C).²⁷ Accordingly, summary judgment in favor of the defendant is appropriate as to count one.

27 For similar reasons, the defendant prevails on count nine of the complaint. Count nine alleges that the Secretary violated National Standard Three, which states that, "To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination." 16 U.S.C. § 1851(a)(3). As stated above, the Secretary is currently pursuing measures to manage Atlantic sharks internationally. In the interim, the Secretary manages the three classes of shark species according to the gear-specific fishery that targets them. The fact that some of the shark species migrate into foreign waters or are targeted by foreign fishermen does not preclude the Secretary from taking domestic measures to conserve and rebuild destructively fished stocks.

Count Six: The Administrative Procedure Act

[17] The APA proscribes agency action that is arbitrary and capricious. 5 U.S.C. § 706(2)(A). In count six the plaintiffs challenge the Secretary's process of setting the 1997 LCS quotas and the validity of the scientific models underlying the quotas.

In assessing LCS stocks for the 1997 quotas, the Secretary considered scientific evidence indicating, in part, that (1) catch rates of many of the species and species groups declined by approximately 50 to 75 percent from the early 1970's to the mid-1980's, (2) stocks at the beginning of 1996 were 59 to 65 percent of that which would produce a maximum sustained catch, and (3) 1995 mortality rates were approximately 1.7 to 2 times that which would

produce maximum sustained catch. See NMFS Decision Memorandum, A.R. Vol. 5, part IV-K-17.

The SEW report acknowledges that each stock assessment model used by the Secretary has inherent weaknesses. For example, the "closed" stock assumptions of the demographic and the population models are undermined by undeniable evidence that some LCS species migrate. However, the extent of migration remains uncertain. The record evidences conflicting views on the issue. Absent more conclusive documentation of the piscatory effects of migration, I cannot peremptorily determine that the Secretary's "closed" model evaluations are legally void or dismissively irrational.

As indicated previously, each model offers at least limited utility, providing a different but constrained perspective on common data. The modeling studies indicate collectively that, at present, there is no scientifically mature, experientially validated, and "proper" method for measuring and projecting shark stocks. Presumably the ideal method awaits the assimilation of more complete data, the restoration of old data, the development of more refined modeling, more conclusive studies on the effect of stock and fishing migration, and the enlightening passage of time and events. Until such time, the Secretary's superintendence with respect to LCS will necessarily entail some measure of intuitive management that the proponents will applaud as wisdom and the detractors will condemn as mere caprice. The regulatory framework permits this managerial result and implies the predictable commentary. See *Fishermen's Dock Cooperative, Inc. of Point Pleasant Beach, N.J. v. Brown*, 75 F.3d 164, 172 (4th Cir.1996) ("[T]he Monitoring Committee indulged only in the kind of arbitrariness that is inherent in the exercise of discretion amid uncertainty and not the kind of arbitrariness that the statute condemns when it exists in tandem with capriciousness.").

Administrative decisionmaking is not an exact science, and judicial review must recognize that some arbitrariness is inherent in the exercise of discretion amid uncertainty. Accordingly, courts reviewing this type of administrative decision must leave room for a certain amount of play in the joints.

Associated Fisheries of Maine, Inc. v. Daley, 127 F.3d 104, 111 (1st Cir.1997). Faced with unsettled science and data, the Secretary may exercise his statutory discretion and reasonably select from an array of reasoned choices.

The plaintiffs also suggest that the quota reduction is unwarranted because the FMP *1430 and its 1993–1996 quota levels stabilized the LCS stocks. The record tenaciously disagrees. Although catch quotas have been in effect since 1993, the record lacks significant and valid proof that LCS stocks are presently increasing. Most CPUE indices manifest a continued and significant decline from 1986–1995. The most pessimistic MLE model results (using data collected after imposition of FMP reporting requirements) indicate that the U.S. LCS stocks will continue to have a negative intrinsic rate of increase even under a zero-catch scenario, suggesting irresistibly the possibility that LCS may have already lost their ability to replenish and that these sharks are headed toward extinction. Even considering more optimistic projections, one must conclude that LCS—which reproduce relatively infrequently—have not increased in number since the Secretary implemented FMP measures in 1993. Considering the most updated and most complete data, the SEW in 1996 found no significant evidence of bountiful propagation. This fundamental observation proved the original FMP projections wrong and prompted the Secretary's dramatic, yet interim, prophylactic action.

The Secretary adopted the 1997 catch quotas to hedge against the risk of systemic failure and to achieve an immediate reduction in fishing mortality concurrent with the development of a long-term rebuilding schedule. The Magnuson Act and the FMP's regulatory adjustment procedure authorize the Secretary to compensate. In short, he did just that. *See* 16 U.S.C. § 1854(g)(1)(E) (“[T]he Secretary shall ... review, on a continuing basis (and promptly whenever a recommendation pertaining to fishing for highly migratory species has been made under a relevant international fishery agreement), and revise as appropriate, the conservation and management measures included in the plan”); 50 C.F.R. § 678.26 (1993) (“In accordance with the regulatory adjustment procedures specified in the FMP, the [Secretary] may establish or modify the following for species or species groups in the shark fishery: maximum sustainable yield, total allowable catch, quotas, trip limits, bag limits, size limits, the fishing year or fishing season, the species of sharks managed

and the specification of the species groups to which they belong, and permitting and reporting requirements”); A.R. Vol. 1, tab 1, 1, at 85–87(FMP). Under the circumstances, the Secretary's actions (including the 50 percent cut in commercial quotas for LCS) are not arbitrary and capricious. The quotas seem reasonable given the congressional mandate to rebuild overfished stocks, the centerpiece of the Sustainable Fisheries Act, Public Law 94–265, which amended the Magnuson Act. *See* 16 U.S.C. § 1854(e)(1), (3) (requiring the Secretary to identify fisheries that are overfished or are approaching an overfished condition and to develop, within a year, a management plan to end overfishing and to rebuild affected stocks of fish in the shortest period of time possible); 16 U.S.C. § 1851(a)(1).

Finally, I reject the plaintiffs' argument that, because they represent a domestic solution to an international problem, the Secretary's quota reductions are irrational. Inconclusive studies on migration, including the impact of migration on the U.S. commercial fishery, prevent one from labeling depleting LCS stocks as exclusively international in scope. The United States can certainly act domestically to manage and conserve shark species which, although proven to migrate into foreign waters, are subject to certain oblivion absent a robust measure of regulatory intervention. The Magnuson Act explicitly recognizes the inherent difficulty (including delay) implicit in pursuing and implementing international agreements. The Magnuson Act accordingly authorizes the Secretary to pursue appropriate domestic action to conserve migratory fish. *See* 16 U.S.C. § 1801(a). I find for the defendant as to count six.

Count Seven: National Standard One

[18] National Standard One requires that all “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing *1431 industry.” 16 U.S.C. § 1851(a)(1). As amended by Congress on October 11, 1996, the statutory definition of “optimum” specifically provides that the optimum yield of a fishery may be prescribed based on the maximum sustainable yield (“MSY”) as reduced by any relevant economic, social, or ecological factors. 16 U.S.C. § 1802(28). For overfished species, such as LCS,

management for optimum yield necessarily provides for rebuilding of stocks to a level consistent with MSY. *Id.*

The SEW has yet to obtain a definitive estimate of the level of shark fishing corresponding to MSY. *Compare* A.R. Vol. 2, tab IV-C-3, at 21 (1996 SEW report) with A.R. Vol. 1, tab II-1, at 9-10 (1994 SEW report). However, merely because the 1996 SEW report arrives at no concrete numerical MSY specifications does not mean that the 1997 quotas violate National Standard One. *National Fisheries Institute*, 732 F.Supp. at 225. Undeveloped science and incomplete data currently preclude precision.

Further, the record fails to support the plaintiffs' argument that all of the components for determining optimum yield have remained static since the FMP was completed in 1993. The FMP premises its LCS management measures on the conclusion that LCS stocks are already overfished. One of the key findings of the 1996 SEW report is that LCS populations are not increasing under the present regimen. Some constituents and public comments strongly supported both further catch restrictions and closing the U.S. shark fishery until rebuilding is evident. *See, e.g.*, A.R. Vol. 4, tabs IV-D-3,5; tab IV-G-4; tab IV-H-1,5,6, Vol. 7, tab V.

In these circumstances, the relevant inquiry under National Standard One is not whether the challenged quota ensures to shark fishermen the highest possible catch during the current year but whether the quota is consistent with preventing overfishing while awaiting the onset of an optimum yield on a *continuing* basis. In *Trawler Diane Marie, Inc. v. Brown*, 918 F.Supp. 921, 929 (E.D.N.C.), *aff'd*, 91 F.3d 134, 1996 WL 406255 (table)(4th Cir.1996), the court specifically considered the requirements of National Standard One and affirmed the interim decision of the Secretary to close a scallop fishery. The court reasoned that the interim measure expedited the achievement of optimum yield for the fishery, in part because prevention of overfishing in the interim more nearly guarantees the long-term health of the fishery. Similarly, the court in *J.H. Miles & Co., Inc. v. Brown*, 910 F.Supp. 1138, 1148 (E.D.Va.1995), found that the Secretary's 1995 commercial catch quotas for surf clams and ocean quahog conformed comfortably to National Standard One because the Secretary acted to impress on the status quo a presumably wholesome arrangement, which the Secretary believed to benefit the long-term health of the fishery.

As in *Trawler Diane Marie* and *J.H. Miles*, the Secretary's decision to reduce the LCS quotas constitutes a cautious, risk-averse approach, designed to safeguard against further injurious declines in shark stocks and to ensure optimal yield and repopulation. Given current knowledge about the status of LCS stocks, the 50 percent reduction imposed by the Secretary approximates purposefully the 50 percent probability that the LCS stocks will increase by any amount between 1996 and 1999. Considering the uncertainty in the data and the current stock assessment method, the Court defers to the Secretary's decision in "making difficult policy judgments and choosing appropriate management and conservation measures based on [his] evaluation[] of the relevant quantitative and qualitative factors." *National Fisheries Institute*, 732 F.Supp. at 223; *see also Fishermen's Dock Cooperative, Inc. of Point Pleasant Beach, N.J. v. Brown*, 75 F.3d 164, 172 (4th Cir.1996) ("[T]he choice of how much assurance [that the target fishing mortality will not be exceeded] to indulge in must be a policy choice left to the reasonable exercise of the discretion of the statutorily-authorized *1432 decision-makers.").²⁸ Accordingly, summary judgment in favor of the defendant is appropriate as to count seven.

²⁸ For these reasons I discount the plaintiffs' arguments that the 1997 quotas amount to "regulatory overkill." *See Fishermen's Dock Cooperative Inc. of Point Pleasant Beach, N.J. v. Brown*, 75 F.3d 164, 170 (4th Cir.1996).

Count Eight: National Standard Two

[19] National Standard Two provides that, "Conservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). Under the "best scientific information available" standard, the Secretary must derive his determinations from the sum of pertinent and available information. *See Parravano v. Babbitt*, 837 F.Supp. 1034, 1046 (N.D.Cal.1993)("[b]y requiring that decisions be made on the best scientific information available, the [Magnuson] Act acknowledges that such information may not be exact or totally complete"), *aff'd*, 70 F.3d 539 (9th Cir.1995), *cert. denied*, 518 U.S. 1016, 116 S.Ct. 2546, 135 L.Ed.2d 1066 (1996); *J.H. Miles*, 910 F.Supp. at 1152 ("[T]he Magnuson Act permits the Secretary's designees to act on information that is incomplete or if there are differences in available information.").

[20] [21] In many respects the data and the methods used by the Secretary in assessing stocks fail to yield definitive conclusions. Inconclusiveness alone, however, does not preclude the Secretary from acting based on a thorough consideration of available and relevant data. See *Trawler Diane Marie*, 918 F.Supp. at 929. Difficulties with the data and the nature of the scientific method are expected in managing a resource as elusive as a fishery. See *Associated Fisheries of Maine, Inc. v. Daley*, 954 F.Supp. 383, 389 (D.Me.1997) (affirming the Secretary's adoption of amendments to the northeast multispecies fishery management plan for species including haddock and yellowtail flounder), *aff'd*, 127 F.3d 104 (1st Cir.1997). The administrative record in *Associated Fisheries* recounts "strenuous disagreement among the scientists and economists" regarding the interpretation of data, the analysis of difficult problems, the interpretation of historical information, and prediction of the future. 954 F.Supp. at 389. However, in concluding that the Secretary acted within his regulatory discretion, the court reasoned that:

it is appropriate ... for the Secretary to be conservative in dealing with the issue of conservation and, in the face of uncertainty, to take the more strenuous measures—even though they may unfortunately have a short term drastic negative effect on the fishing industry.

Id. at 390. As in *Associated Fisheries*, the administrative record before the Court elaborates "strenuous disagreement" among scientists but describes no abuse of discretion or caprice emanating from the Secretary.

The 1996 SEW report premises its conclusions on the analysis of shark fishery data by differing statistical models. The report acknowledges that each model includes some limiting omission, distortion, or the like. However, the 1996 SEW report concludes that LCS stocks are depleting because of insufficiently regulated harvests and that corrective action is necessary. National Standard Two, along with the crystalline congressional command informing the Magnuson Act, disfavors patient and lenient inaction by the Secretary until today's grim statistical forecasts are definitively experienced in the tangible form of future severe or irremediable declines in shark stock. As stated by the court in *National*

Fisheries Institute, Inc. v. Mosbacher, 732 F.Supp. 210 (D.D.C.1990):

[T]he Magnuson Act does not force the Secretary and Councils to sit idly by, powerless to conserve and manage a fishery resource, simply because they are somewhat uncertain about the accuracy of relevant information.

Id. at 220. The administrative record before the Court evinces a healthy debate (both within NMFS and between NMFS and participating constituencies) which featured noticeably vocal expert opinions both supporting and opposing the means employed by the *1433 Secretary. "It is the prerogative of [the Secretary] to weigh those opinions and make a policy judgment based on the scientific data." *Organized Fishermen of Florida v. Franklin*, 846 F.Supp. 1569, 1577 (S.D.Fla.1994).

An agency charged with conserving and rebuilding morbidly fished stocks must wait for neither perfect science nor unanimous consent. Based on information available to him, the Secretary proceeded cautiously in setting interim quotas. *Trawler Diane Marie*, 918 F.Supp. at 929. Another authority may have chosen a different course. As stated by the Court in *Mosbacher*,

[The Secretary's decision to implement the FMP] represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

732 F.Supp. at 226-27 (quoting *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837, 865-66, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (citation and footnotes omitted)).

Judicial review at this juncture is limited to determining whether the Secretary intelligently and knowingly decided on a rational policy, given the scientific and judgmental tools available to him. I find that the Secretary fulfilled the minimum obligations imposed by the APA and National Standard Two. Accordingly, summary judgment in favor of the defendant is appropriate as to count eight.²⁹

²⁹ Although they focus their arguments for each count almost entirely on the LCS quotas, the plaintiffs also challenge the catch limits set for pelagic sharks and SCS in 1997. Following no new analysis during the 1996 SEW, the Secretary simply maintained the quota levels set previously for pelagic sharks pursuant to the FMP. I find no adequate reason to disturb this decision. I also find record support for the Secretary's decision to establish a quota for SCS. The FMP determined that SCS are fully fished in terms of the species' ability to reproduce and replace themselves over time. Of course, the reduction in LCS quotas would have the predictable effect of transferring significant fishing pressure to SCS stocks, causing overfishing. Given the balance of his obligations under the Magnuson Act, I believe the Secretary reasonably concluded that the catch limits for SCS were necessary.

Counts Four, Twelve, Fifteen and Sixteen: Economic Impact on Small Businesses

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 *et seq.*, requires an agency promulgating a rule to consider the effect of the proposed regulation on small businesses and to design mechanisms to minimize any adverse consequences. In 1996, by enacting Title II of the Small Business Regulatory Enforcement and Fairness Act of 1996 (the "SBREFA"), Pub.L. No. 104-121, Title II, Congress authorized judicial review of an agency's

compliance with specific provisions of the RFA. Congress limited judicial review of the RFA to "agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610." 5 U.S.C. § 611(a)(1).³⁰ The SBREFA allows judicial review "in accordance with Chapter 7" of the APA, including *1434 the "arbitrary and capricious" standard prescribed by 5 U.S.C. § 706(2)(A). 5 U.S.C. § 611(a)(1); *see Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104 (1st Cir.1997).

³⁰ Agency compliance with §§ 607 and 609(a) is reviewable only in connection with judicial review of claims under § 604. 5 U.S.C. § 611(a)(1).

In count fifteen the plaintiffs allege that NMFS failed to prepare an initial regulatory flexibility analysis ("IRFA") pursuant to § 603,³¹ solicit comments on the IRFA, and prepare a final regulatory flexibility analysis ("FRFA") incorporating public comment proceedings, pursuant to § 604.³² The RFA exempts an agency from the requirement to publish an IRFA and an FRFA if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b); *see Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106 (3rd Cir.1997). In count sixteen the plaintiffs allege that the FRFA prepared by NMFS failed to comply with § 604. Both NMFS's certification pursuant to § 605(b) and the adequacy of a FRFA are reviewable. 5 U.S.C. § 611(a)(1).

³¹ Section 603(b) requires an IRFA to contain the following:

- (1) a description of the reasons why action by the agency is being considered;
- (2) a succinct statement of the objectives of, and legal basis for, the proposed rule;
- (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

Section 603(c) prescribes the following:

Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

- (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
- (3) the use of performance rather than design standards; and
- (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

32 Section 604(a) requires each FRFA to contain:

- (1) a succinct statement of the need for, and objectives of, the rule;
- (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

[22] [23] At the time the agency issued the proposed rule, NMFS certified that the quota reduction was not

expected to significantly affect a substantial number of small entities. In suspiciously cryptic terms included in the Draft Regulatory Impact Review, NMFS concluded that shark fishermen are nimble and adaptive in their fishing operations (that is, they pursue sharks in the season as well as other fish and at other times) and that the shark fishing season was historically too brief to permit a prudent fisherman to rely exclusively on annual revenue from shark fishing. A.R. Vol. 5, tab IV-K-16, at 28. In response, commercial fishermen submitted *1435 comments explaining their dependence on sharks (especially LCS) and the quotas' punitive effect on their livelihood. The RFA watch-dog, the Small Business Administration ("SBA"), also strongly criticized NMFS's "no significant impact" certification, stating that it was "perplexed" and "bewildered" by the "illogical" certification. A.R. Vol. 5, tab IV-K, 13. Even "crude" calculations, SBA explained, demonstrate that the Commerce Department's RFA thresholds³³ were met. *Id.* at 2-3. Furthermore, the SBA concurred with industry that, contrary to NMFS's assurances, the directed shark fishermen's "conversion to other fishing operations is costly and probably not feasible." *Id.* at 3-4. Accordingly, it was "clear" to the SBA that NMFS should have prepared an IRFA. The agency refused to budge. *Id.* at 4. On April 1, 1997, NMFS re-certified to the SBA that the 1997 Atlantic shark quotas would not have the requisite significant impact. A.R. Vol. 5, tab IV-K, 65.

- 33 Under Commerce Department regulations, a rule is considered to have a significant impact if a significant number of small entities (twenty percent of those engaged in the fishery) have a reduction in gross revenues of more than five percent or if more than two percent of those engaged in the fishery are forced to cease operations. See A.R. Vol. 5, tab IV-K-16.

The plaintiffs point to plentiful record evidence undermining NMFS's certifications. NMFS inconsistently characterizes the universe of shark fishermen in the record. In some cases NMFS appears to rely on the 2,000-plus entities with Atlantic shark permits to represent the actual number of shark fishermen. In one of the agency's analyses, NMFS explains that, "In 1994, a total of 2,026 permits were issued to qualifying individuals and attached to vessels, but the 326 vessels that actually harvested the resource are deemed to comprise the shark fishery in the United States." A.R. Vol. 6, tab IV-M, 11, at 63. However, on March 25, 1997, NMFS informed NBC News that "NMFS estimates are that about 100-150

vessels regularly catch the quota." A.R. Vol. 5, Tab IV-K, 47.

Further, in a transparent and unbecoming effort to demonstrate limited economic dependence, NMFS inserted into its re-certification to the SBA the estimate that average gross revenue from shark fishing was only \$26,426. The record fails to contain an adequate explanation of the agency's calculation, if any, leaving no possibility to gauge its rationality, which is manifestly suspect. Further, NMFS cannot demonstrate how the loss of a major portion of \$26,426 (even assuming that figure has a rational basis) would not, pursuant to Department of Commerce regulations, constitute a significant economic impact on a substantial number of directed shark fishermen.

In addition, NMFS attempted to justify its re-certification to the SBA on the basis that shark fishermen can effortlessly transfer their fishing efforts to other fish stocks for which they might have (or may obtain) permits. The plaintiffs submitted three declarations (including one from an OT member and one from a Mid-Atlantic Fishery Management Council member) canvassing potential fisheries and refuting the agency's effortless transferability claim. In summary, these declarations aver that other potential fisheries (including those identified by the defendant as alternative fisheries) (1) are or will become subject to limited access plans that will not permit relatively new entrants to remain in the fishery (*e.g.*, swordfish, tuna, king and Spanish mackerel, snapper-grouper-tilefish reef fish complex, monkfish), (2) are often subject to restrictive quotas (*e.g.*, tuna and swordfish) and other effort limitations such as trip limits, longline prohibitions, and entry lotteries (*e.g.*, king mackerel, snapper-grouper, crawfish), and (3) cannot support additional fishing effort (*e.g.*, tilefish). Further, the declarations suggest that some shark fishermen cannot afford (or qualify for capital borrowing) to buy the gear used to harvest other species (*e.g.*, king mackerel, monkfish, summer flounder, squid, tilefish) and that the shark boats, approximating 40 feet from stern to bow, are unsuitable for *1436 other fisheries (*e.g.*, swordfish, tuna, king mackerel).³⁴

³⁴ I permitted the plaintiffs to file the extra-record affidavits on the limited question of whether the Secretary failed to consider relevant factors in framing his regulatory decision (Doc. 21). Such

supplementation is permissible. 5 U.S.C. § 706; *see Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242 (11th Cir.1996). Consideration of extra-record evidence is the only method of testing allegations that the government failed to allow sufficient notice and comment in the rule-making process. Nevertheless, although I find the supplemental declarations illuminating, my conclusions stand independently on the administrative record. *See Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir.1997).

Finally, in formulating the FMP and quota adjustments prior to 1997, the Secretary refused to employ harsher quota measures out of concern for the effect of the measures on the industry. The Secretary's current position, that the quota reductions will have no significant effect on participants of the fishery, is at least incongruous with the Secretary's previous pronouncements and actions.

Ultimately, perhaps recognizing the tactical mistake of not preparing an IRFA, NMFS prepared a FRFA in a March, 1997, document entitled "Final Environmental Assessment and Regulatory Impact Review/Final Regulatory Flexibility Analysis." The FRFA added little substance to NMFS's prior "no significant impact" certifications. *Compare* A.R. Vol. 5, tab IV-K, 65, at 1-2 (SBA re-certification) *with* A.R. Vol. 5, tab IV-K, 34, at 32-33 (Final EA and RIR/FRFA). This effort partakes of an artifice to feign good faith, statutory compliance.

Having studied the entire record, I conclude that the Secretary's "no significant impact" certification and the FRFA fail to satisfy APA standards and RFA requirements. The record strongly indicates that the 1997 quotas, and most prominently the LCS quota, will significantly injure the prospects of shark fishermen pursuant to Commerce Department thresholds. The record also severely discredits NMFS's argument that no fishermen are dependent on shark fishing and that the plaintiffs can effortlessly transfer their fishing efforts to other stocks. One can no more readily change a bass boat to a flats boat than change directed shark fishing paraphernalia to equipment for profitable tuna fishing. To suggest otherwise is to transgress the knowledge and common sense that are insinuated into reality; it is a contrivance that imports arrogance.

The lapses and inconsistencies in the record most likely stem from NMFS's failure to prepare an IRFA in the first instance. Pursuant to § 603, an IRFA would have required NMFS to engage in a careful and meaningful study of the problem from the beginning. With notice of NMFS's position, the public could have engaged the agency in the sort of informed and detailed discussion that has characterized this litigation. Instead, NMFS chose an insular approach designed to block further investigation and public scrutiny. NMFS compounded this error by preparing a FRFA that constitutes an attempt to agreeably decorate a stubborn conclusion.

NMFS prepared an FRFA lacking procedural or rational compliance with the requirements of the RFA. Section 604 requires that any FRFA contain "a summary of the significant issues raised by public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments." 5 U.S.C. § 604(a)(2). NMFS could not possibly have complied with § 604 by summarizing and considering comments on an IRFA that NMFS never prepared. NMFS's refusal to recognize the economic impacts of its regulations on small businesses also raises serious question about its efforts to minimize those impacts through less drastic alternatives. Section 604(a)(5) requires each FRFA to "describe] ... the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes" and then to explain why the agency chose a particular course. NMFS may not have rationally considered whether and how to minimize the 1997 quotas' economic impacts because *1437 the agency fundamentally misapprehended the unraveling economic effect of its regulations on small businesses.

[24] I am mindful that the RFA does not require mechanical exactitude. However, the statute compels the Secretary to make a "reasonable, good-faith effort," prior to issuance of a final rule, to inform the public about potential adverse effects of his proposals and about less harmful alternatives. *Associated Fisheries*, 127 F.3d at 114-15. Consideration of the record as a whole convinces me that the Secretary's defalcation unlawfully compromised his ability to render a reasoned and informed judgment with respect to the reduced quotas' economic impact on small businesses. Accordingly,

summary judgment in favor of the plaintiffs is appropriate as to counts fifteen and sixteen.³⁵

35 Section 1854(g)(1)(G)(ii) of the Magnuson Act (count four) directs the Secretary to "take into consideration traditional fishing patterns of fishing vessels of the United States and the operating requirements of the fisheries." National Standard Eight (count twelve) also requires the Secretary to consider the importance of fishery resources to fishing communities to "(A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities." 16 U.S.C. § 1851(a)(8). I find that summary judgment in favor of the plaintiffs is appropriate with respect to counts four and twelve to the extent consistent with this order.

Remedy

[25] The RFA affords considerable discretion in formulating an appropriate remedy for the Secretary's failure to comply with the statute. In granting relief for a violation, a court may take corrective action which includes remanding the rule to the agency and deferring enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest. See 5 U.S.C. § 611(a)(4).

[26] Accordingly, the Court **REMANDS** the agency's RFA determinations to the Secretary with instructions to undertake a rational consideration of the economic effects and potential alternatives to the 1997 quotas. On or before May 15, 1998, the Secretary shall submit to the Court an analysis that complies with applicable law. See, e.g., *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104 (1st Cir.1997). The Court will retain jurisdiction over this case to review the economic analyses the Secretary conducts pursuant to this order.³⁶ Considering the delicate status of the Atlantic sharks (especially LCS) and pursuant to § 611(a)(4), the public interest requires maintenance of the 1997 Atlantic shark quotas pending remand and until further order of the Court.

36 The same remedy is appropriate for the Secretary's violation of National Standard Eight and § 1854(g)(1)(G)(ii). See *North Carolina Fishery Ass'n v. Daley*, Civ. No. 2:97cv339 (E.D.Va.1997) (imposing congruent remedy for RFA and National Standard violations).

The Clerk is directed (1) to enter judgment in favor of the defendant and against the plaintiffs as to counts one, two, three, six, seven, eight, and nine of the complaint, (2) to enter judgment in favor of the plaintiffs and against the defendant as to counts four, twelve, fifteen, and sixteen of the complaint, (3) to terminate all pending motions,

and (4) to administratively close this case pending further order of the Court.

All Citations

995 F.Supp. 1411, 28 Env'tl. L. Rep. 21,183

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 16-1005 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICANS FOR CLEAN ENERGY, ET AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Petition for Review of Action by the U.S. Environmental Protection Agency

BRIEF FOR RESPONDENT EPA

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RESPONDENT'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Respondent United States Environmental Protection Agency (“EPA” or “the Agency”) submits this certificate as to parties, rulings, and related cases.

A. Parties and Amici

All petitioners, respondents, and intervenors appearing in this Court are accurately identified in the opening briefs of Petitioners.

American Soybean Association, Arvegenix, Inc., CVR Energy, Inc., Canola Council of Canada, National Renderers Association, Small Retailers Coalition, and U.S. Canola Association are amici curiae for Petitioners in all consolidated cases.

B. Rulings Under Review

The agency action under review is EPA’s Rule entitled “Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017,” 80 Fed. Reg. 77,420 (Dec. 14, 2015).

C. Related Cases

These consolidated cases have not previously been before this Court or any other court. Petitioners in consolidated case numbers 16-1044, 16-1049, and 16-1054 have separately filed petitions in this Court, Nos. 14-1014, 16-1032, 16-1052, and 16-1055, which challenge EPA’s regulation, promulgated in 2010 and codified at 40 C.F.R. § 80.1406, that designates refiners and importers of gasoline or diesel

fuel as “obligated parties” under the Renewable Fuel Standards program. As required by this Court’s precedent, these parties have also filed administrative petitions with EPA, and these cases are currently being held in abeyance pending EPA’s review of the administrative petitions. See Oljato Chapter of the Navajo Tribe v. Train, 515 F.2d 654, 666 (D.C. Cir. 1975).

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GLOSSARY

ACEI Petitioners	Petitioners in Nos. 16-1005 and 16-1056
AFPM	American Fuel & Petrochemical Manufacturers
API	American Petroleum Institute
B11	Fuel containing 11% biodiesel content
B15	Fuel containing 15% biodiesel content
B20	Fuel containing 20% biodiesel content
B100	Fuel containing 100% biodiesel content
CAA	Clean Air Act
CNG/LNG	Compressed or liquid natural gas produced from biogas
E10	Gasoline blend with no more than 10% ethanol content
E85	Gasoline blend containing 51% to 83% ethanol content
EIA	Energy Information Administration
EISA	Energy Independence and Security Act of 2007
EPA	Environmental Protection Agency
NBB	National Biodiesel Board
NPRA	National Petrochemical & Refiners Association
OPP	Obligated Party Petitioners
RFS	Renewable Fuel Standards
RIN	Renewable Identification Number

INTRODUCTION

Congress created the Renewable Fuel Standards (“RFS”) program in the Clean Air Act (“CAA” or “the Act”) to expand the domestic use of renewable fuels and reduce greenhouse gas emissions. The Act directs the United States Environmental Protection Agency (“EPA” or “the Agency”) to set annual standards to achieve specified volumes of domestic renewable fuel use and gives EPA authority to adjust those volumes as part of its annual standard-setting process. 42 U.S.C. § 7545(o)(3)(B), (7)(A), (D). Petitioners challenge EPA’s final action adjusting the annual volumes and setting the annual standards for the years 2014, 2015, and 2016. Petitioners representing renewable fuel groups argue that the standards are too low. Petitioners representing parties that must comply with the standards argue that they are too high, or should not apply to them at all. EPA properly exercised its authority under the Act in setting the annual standards in the face of converging challenges to renewable fuel growth under the program, and fully and rationally evaluated the concerns of multiple parties across the complex renewable fuels market. EPA’s reasoned action should be upheld.

JURISDICTION

On December 14, 2015, EPA published a Final Rule establishing Renewable Fuel Standards for 2014, 2015, and 2016 and the Biomass-Based Diesel Volume

Requirements for 2017. 80 Fed. Reg. 77,420 (“the Rule”). Petitioners¹ timely filed petitions for judicial review. The Court has jurisdiction under the Clean Air Act, 42 U.S.C. § 7607(b).

PERTINENT STATUTES AND REGULATIONS

Petitioners’ opening briefs and the addendum to this brief contain pertinent statutes and regulations.

STATEMENT OF ISSUES

1. This Court has held that EPA has broad discretion to determine whether and under what circumstances to use its cellulosic waiver authority to lower the statutory volume targets for advanced and total renewable fuels when it lowers the volume of cellulosic biofuel. Did EPA reasonably exercise this broad discretion when it lowered the statutory volumes of advanced biofuel using the cellulosic waiver provision?

¹ Petitioners in this consolidated action are: (1) in case Nos. 16-1005 and 16-1056, Americans for Clean Energy, Inc., Renewable Fuels Association, Growth Energy, American Coalition for Ethanol, Biotechnology Innovation Organization, National Sorghum Producers, National Corn Growers Association, National Farmers Union (collectively, “ACEI Petitioners”); (2) in case No. 16-1053, National Biodiesel Board (“NBB”); and (3) in case Nos. 16-1044, 16-1047, 16-1049, 16-1050, 16-1054, American Fuel & Petrochemical Manufacturers (“AFPM”), American Petroleum Institute (“API”), Monroe Energy, LLC, Valero Energy Corp., Alon Refining Krotz Springs, Inc., American Refining Group, Inc., Calumet Specialty Products Partners, L.P., Ergon-West Virginia, Inc., Hunt Refining Company, Lion Oil Company, Placid Refining Company, U.S. Oil & Refining Company, and Wyoming Refining Company (collectively, “Obligated Party Petitioners”).

2. The Act authorizes EPA to use its general waiver authority to lower the statutory volumes of renewable fuel when there is an “inadequate domestic supply.” Where the statute does not define “supply,” and the term could apply at many different points in the transportation fuel supply chain, should the Court defer to EPA’s interpretation and use of its general waiver authority to further lower the volume of total renewable fuel based on a finding of inadequate supply of renewable fuel to the ultimate consumer?
3. Were the methodology and technical analyses EPA used to assess the 2016 volumes of total renewable fuel and advanced biofuel reasonable and supported by evidence in the record?
4. Under this Court’s precedent, EPA must take a “neutral aim at accuracy” when projecting cellulosic biofuel production. Was EPA’s outcome-neutral methodology used to project cellulosic biofuel production in 2016 reasonable and supported by the record?
5. Under this Court’s well-settled precedent, EPA is authorized to impose renewable fuel obligations as required by the Act even when EPA has missed statutory deadlines. Did EPA act reasonably in setting biomass-based diesel volumes after the statutory deadlines when it followed this Court’s precedent for setting volumes in such circumstances?

6. EPA issued a regulation in 2007 designating the parties that must comply with the renewable fuel standards, and reaffirmed that decision in a 2010 rulemaking. Where EPA did not propose to reconsider the matter and the Act unambiguously confers broad discretion on EPA to determine when and on what grounds to identify obligated parties, was it arbitrary or capricious for EPA to treat comments on a change in the longstanding point of obligation as “outside the scope of this rulemaking”?

STATEMENT OF THE CASE

I. Statutory Background

In 2005, and again in 2007, Congress amended the CAA to establish a Renewable Fuel Standards (“RFS”) program, now codified at 42 U.S.C. § 7545(o). See Energy Policy Act of 2005 (“EPAct”), Pub. L. No. 109-58, 119 Stat. 594 (2005); Energy Independence and Security Act of 2007 (“EISA”), Pub. L. No. 110-140, 121 Stat. 1492 (2007). To “move the United States toward greater energy independence and security,” 121 Stat. 1492, the Act requires increasing use over time of “renewable fuel,” which is fuel made from biomass sources “used to replace or reduce the quantity of fossil fuel present in transportation fuel.” 42 U.S.C. § 7545(o)(1)(J). The Act establishes increasing annual “applicable volume” targets for four categories of renewable fuels—total renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel—to be used in the

U.S. transportation fuel system.² 42 U.S.C. § 7545(o)(2)(B)(i). Advanced biofuels are a subset of renewable fuels that produce lower lifecycle greenhouse gas emissions than conventional renewable fuels such as corn-based ethanol. 42 U.S.C. § 7545(o)(1)(B). Biomass-based diesel is a subset of advanced biofuels and is a diesel fuel substitute made from feedstocks such as oils and animal fats. Id. § 7545(o)(1)(D); 40 C.F.R. § 80.1426 Table 1. Cellulosic biofuel is also a subset of advanced biofuel derived from cellulose materials such as switchgrass and crop residue that produces even lower lifecycle greenhouse gas emissions than other advanced biofuels. 42 U.S.C. § 7545(o)(1)(E); 40 C.F.R. § 80.1426 Table 1.

Applicable volume targets for total renewable fuel, advanced biofuel and cellulosic biofuel are specified by the Act for each year through 2022. 42 U.S.C. § 7545(o)(2)(B)(i). For biomass-based diesel, the Act specifies applicable volumes only through 2012. Id. After those dates, the applicable volumes are set by EPA in accordance with factors specified in the statute. Id. § 7545(o)(2)(B)(ii). EPA must determine those volumes fourteen months before the year in which they will apply. Id.

Congress directed EPA to establish a compliance program and then to set annual percentage standards to ensure that the applicable volumes are used each

² The Act also allows credits for renewable fuels used to replace or reduce the amount of fossil fuel present in home heating oil and jet fuel. See 42 U.S.C. §§ 7545(o)(1)(A), 7545(o)(5)(E).

year. Id. §§ 7545(o)(2)(A)(i), (iii), 7545(o)(3)(B)(i). EPA calculates the annual percentage standards by dividing the applicable volume for each type of renewable fuel by the Energy Information Administration's ("EIA") estimate of the national volume of transportation fuel that will be sold or introduced into commerce that year. Id. § 7545(o)(3)(A). Obligated parties apply those percentage standards to their own annual production or importation of gasoline and diesel to calculate their individual renewable volume obligations. Id. § 7545(o)(3)(B)(ii). EPA must determine the percentage standards for each calendar year by November 30 of the prior year. Id. § 7545(o)(3)(B).

The percentage standards for certain renewable fuels are "nested," meaning more specific forms of renewable fuel are a subset of broader categories of such fuel. Specifically, cellulosic biofuel and biomass-based diesel are subsets of advanced biofuel, and advanced biofuel is a subset of total renewable fuel. See id. § 7545(o)(1)(B), (D), (E), (J). A nested renewable fuel may be used to simultaneously satisfy the more specific standard as well as the broader categories of renewable fuels of which it is a part. Id.; 40 C.F.R. § 80.1427(a)(3). For example, any renewable fuel that qualifies as biomass-based diesel may be simultaneously used to satisfy the biomass-based diesel, advanced biofuel, and total renewable fuel requirements.

CAA Section 211(o)(3)(B)(ii) directs that the annual percentage standards shall “be applicable to refineries, blenders, and importers, as appropriate.” 42 U.S.C. § 7545(o)(3)(B)(ii). EPA identified the “appropriate” obligated parties in its 2007 regulations establishing the RFS program under the EPCA, 72 Fed. Reg. 23,900, 23,923-24 (May 1, 2007), and reaffirmed its approach in its 2010 regulations implementing the EISA amendments. 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010). In a regulation codified at 40 C.F.R. § 80.1406(a)(1) (“Point of Obligation Regulation”), EPA designated refiners and importers of gasoline and diesel fuel as the obligated parties under the program.

Congress gave EPA authority to reduce the statutory applicable volumes under certain circumstances. First, under the “cellulosic waiver provision,” the Act requires that EPA evaluate anticipated cellulosic biofuel production volumes, based on estimates provided by EIA. Id. § 7545(o)(7)(D)(i). If EPA’s projected volume is lower than the volume specified in the statute, the cellulosic waiver provision directs that EPA “shall reduce the applicable volume of cellulosic biofuel required under [the Act] to the projected volume available during that calendar year.” Id. If EPA lowers the applicable volume for cellulosic biofuel, EPA is also authorized—but not required—to lower the applicable volumes for advanced biofuel and total renewable fuel by the same or a lesser amount. Id. The cellulosic waiver provision does not list any specific preconditions or factors that EPA must

consider in determining whether to do so. Id.; see also Monroe Energy, LLC v. EPA, 750 F.3d 909, 915-16 (D.C. Cir. 2014).

The Act also contains a “general waiver provision” that allows, but does not require, EPA to reduce the statutory volume of any type of renewable fuel where, in consultation with the Secretaries of Agriculture and Energy, the Agency determines there is “inadequate domestic supply” or where compliance would “severely harm the economy or environment of a State, a region or the United States.” 42 U.S.C. § 7545(o)(7)(A).

The Act further contains provisions to ease the regulatory burden on obligated parties. For example, it requires EPA to establish a credit program to allow obligated parties who over-comply in one year to apply credits toward compliance in a subsequent year or to sell the credits to another obligated party, which can then use them for its own compliance. Id. § 7545(o)(5)(A)-(C). Obligated parties may also carry a deficit forward to the next year, which must then be satisfied together with the next year’s compliance obligation. Id. § 7545(o)(5)(D). The statute also allows small refineries to apply “at any time” for a hardship exemption. Id. § 7545(o)(9)(B)(i).

II. Regulatory Background

The RFS regulations do not require obligated parties to blend renewable fuel into transportation fuel themselves to comply with the standards. Instead,

producers and importers of renewable fuels generate renewable identification numbers, or “RINs,” for each gallon of renewable fuel they import or produce for use in the United States. 40 C.F.R. § 80.1426(a). RINs form the basis of the credit trading program required by the Act. See 42 U.S.C. § 7545(o)(5); see also 40 C.F.R. §§ 80.1425-29. RINs are assigned to batches of renewable fuel by producers and importers, and may only be “separated” from those batches when purchased by an obligated party or blended to produce transportation fuel. 40 C.F.R. §§ 80.1426(e), 80.1429(b). Once separated, RINs may be traded between any parties registered with EPA. Id. § 80.1428(b). Obligated parties comply with the standards by accumulating RINs and then “retiring” them in an annual compliance demonstration. Id. § 80.1427(a).

The RIN system allows obligated parties to comply in the way they find most economically-efficient, avoiding, if they choose, expenditures associated with fuel blending. 80 Fed. Reg. at 77,483. In addition, should any obligated party accumulate enough RINs to over-comply with the standards, these excess or “carryover” RINs can be used to meet up to twenty percent of an obligated party’s compliance obligation in the following year, or sold to parties that need them. Id. at 77,483; 40 C.F.R. § 80.1427(a)(1), (5).

III. Factual and Procedural Background

A. Challenges to Renewable Fuel Growth Under the RFS Program

The Rule under review addresses three converging challenges to renewable fuel growth: an increasing gap between the cellulosic biofuel targets and projected cellulosic biofuel production; saturation in the fuels market of E10—a fuel blend containing up to 10% ethanol; and lower transportation fuel use than anticipated when the RFS program was enacted.

First, the volume targets in the 2007 EISA amendments called for rapid growth in the then-nascent cellulosic biofuel industry. Under the Act, cellulosic volumes grow from 0.1 billion gallons in 2010 to 16 billion gallons in 2022, representing the majority of the anticipated growth in the advanced and total volumes after 2013. 42 U.S.C. § 7545(o)(2)(B)(i)(III). However, production levels for cellulosic biofuels have fallen far short of the statutory targets. 80 Fed. Reg. at 77,428. EPA projected a level of 230 million ethanol-equivalent gallons of cellulosic biofuels in 2016, only 5.4% of the 4.25 billion gallon statutory target. Id. at 77,422 Table I-1.

Second, the market has become saturated with gasoline containing up to 10% ethanol, or “E10”—the most common renewable fuel blend. Id. at 77,456. The use of ethanol increased dramatically early in the RFS program to satisfy the total renewable fuel standards—gasoline on average contained approximately 4%

ethanol in 2006 and grew to contain over 9% in 2010. Id. However, growth in ethanol use has plateaued primarily because, while E10 is widely distributed and used by all vehicles, higher ethanol blends, such as E15 (15% ethanol) and E85 (blend containing between 51% and 83% ethanol) are sold by a small number of retail stations, and only a small subset of vehicles use E85. Id. This plateau presents challenges to achieving the statutory volumes for total renewable fuel.

Third, due in part to improved vehicle mileage standards, lower gasoline volumes are being consumed than forecast at the time of the EISA amendments, providing less volume in which to blend renewable fuels. 80 Fed. Reg. 33,100, 33,126 (June 10, 2015). Prior to EISA's passage, EIA projected that domestic gasoline consumption would rise to about 159 billion gallons in 2016. 80 Fed. Reg. at 33,126. Instead, gasoline consumption has declined considerably to approximately 140 billion gallons in 2016. 80 Fed. Reg. at 77,511 Table V.B.3-1.

While the use of higher ethanol-blends and non-ethanol biofuels continues to grow, supply has not kept pace with the statutory targets.³ This is because the use

³ For example, the growth of non-cellulosic advanced biofuels has failed to make up for the rapidly increasing cellulosic shortfall. The statute specifies that, from 2012 to 2015, volumes of advanced biofuels would grow from 2.0 to 5.5 billion gallons, and that the cellulosic biofuel portion would increase from 0.5 billion gallons to 3.0 billion gallons. 42 U.S.C. § 7545(o)(2)(B)(i)(I), (II), (III). While the non-cellulosic advanced biofuel supply grew from about 2 billion gallons in 2012 to about 3 billion gallons in 2015, 80 Fed. Reg. at 77,479, this growth has been insufficient to keep pace with the ever-escalating statutory targets, especially in light of the cellulosic shortfall of nearly 3 billion gallons.

of these fuels is limited in the short term by the need for a multitude of actors in the market—such as fuel producers, suppliers, distributors, and retailers—to make the decisions and investments needed for growth. See 80 Fed. Reg. at 77,442.

Significant growth could require construction of renewable fuel production facilities and infrastructure for storage, blending, and distribution. Id. Investments are also needed in cropland to grow feedstocks, and in vehicle types that can accommodate ethanol blends other than E10 or non-ethanol renewable fuels. However, these investment decisions take time to implement and have not kept pace with the rapidly increasing statutory targets. Id. at 77,453.

EPA originally assessed these challenges when it proposed to set volume requirements for advanced biofuels and total renewable fuels below the statutory volumes for 2014 in a November 2013 proposed rulemaking. 78 Fed. Reg. 71,732 (Nov. 29, 2013). However, this proposal “generated significant comment and controversy, particularly about how volumes should be set in light of lower gasoline consumption than” Congress had forecast, “and whether and on what basis the statutory volumes should be waived.” 79 Fed. Reg. 73,007-08 (Dec. 9, 2014). Consequently, EPA announced that it would not finalize the 2014 standards before the end of 2014. Id. at 73,008. Instead, EPA issued a new proposal for 2014, together with proposed standards for 2015 and 2016, leading to the Rule challenged here.

B. The Rule

The challenged Rule was published on December 14, 2015. 80 Fed. Reg. at 77,420. In it, EPA established: (1) the final volume requirements and percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel for 2014, 2015, and 2016; and (2) the 2017 biomass-based diesel volume requirement. Id. In establishing the 2014, 2015, and 2016 requirements, EPA used its cellulosic waiver authority to lower the cellulosic biofuel, advanced biofuel, and total renewable fuel volumes, and then separately used its general waiver authority to further lower the total renewable fuel volumes. The final volume requirements are set forth below, with corresponding statutory targets in parentheses:

Fuel	2014 Volume Requirements	2015 Volume Requirements	2016 Volume Requirements	2017 Volume Requirements
Cellulosic biofuel	0.033 (1.75)	0.123 (3.0)	0.230 (4.25)	N/A
Biomass-based biofuel	1.63 (≥ 1.0)	1.73 (≥ 1.0)	1.90 (≥ 1.0)	2.00 (≥ 1.0)
Advanced biofuel	2.67 (3.75)	2.88 (5.5)	3.61 (7.25)	N/A
Total renewable fuel	16.28 (18.15)	16.93 (20.5)	18.11 (22.25)	N/A

42 U.S.C. § 7545(o)(2)(B)(i)(I)-(IV); 80 Fed. Reg. 77,420, 77,422 Table I-1.⁴

⁴ Volumes are shown in billions of gallons, and are expressed as ethanol-equivalent volumes of renewable fuel, except for biomass-based diesel which is expressed as

i. Use of Waiver Authorities to Determine Final Volume Requirements

In determining the volume requirement for cellulosic biofuel under 42 U.S.C. § 7545(o)(7)(D), this Court has instructed EPA to “take [a] neutral aim at accuracy,” meaning it must estimate projected production volumes as accurately as possible. Am. Petroleum Inst. v. EPA, 706 F.3d 474, 476-81 (D.C. Cir. 2013) (“API”). For 2014—which had already passed—EPA set the cellulosic biofuel volume requirement based on the number of cellulosic RINs actually generated and available for compliance in that year. 80 Fed. Reg. at 77,501-02. For 2015—which had nearly passed—EPA set the volume requirement based on actual cellulosic RIN generation where data was available and on projected cellulosic volumes for the remainder of 2015. Id. at 77,502-07. For 2016, EPA also projected the cellulosic biofuel volumes. Id. at 77,502-09 (projection methodology for 2016 similar to that for 2015).

For its projections, EPA reviewed a range of data and factors to estimate a low-end and high-end range of potential production volumes for each company (or groups of companies) expected to produce cellulosic biofuel in 2016. Id. at 77,503. Because facility-based projections would be too uncertain, EPA created

biodiesel equivalent volumes. 80 Fed. Reg. at 77,424 Table 1.A-1. A gallon of ethanol counts as one gallon of renewable fuel, while a gallon of other biofuels may count as more, depending on its energy content as compared to ethanol. 40 C.F.R. § 80.1415.

four groups of similarly-situated companies, calculated the total low-end and high-end ranges for each group, and then used the “percentile” within the aggregate range for each group that best represents likely production volumes, based on the risks associated with each group. Id. at 77,503, 77,505-06. The resulting volumes for each group were then summed to derive the overall cellulosic biofuel projection. The cellulosic volumes were far lower than statutory targets, so EPA used its cellulosic waiver authority to derive the 2014, 2015, and 2016 cellulosic biofuel percentage standards based on those lower volumes of 33 million gallons, 123 million gallons, and 230 million gallons, respectively. Id. at 77,422 Table I-1, 77,434; see also 42 U.S.C. § 7545(o)(7)(D)(i).

Once it lowered the cellulosic biofuel volumes, EPA exercised its broad discretion under 42 U.S.C. § 7545(o)(7)(D)(i) to consider whether to lower the advanced biofuel and total renewable fuel volumes by up to the same amount. See Monroe Energy, 750 F.3d at 919. EPA determined that it was appropriate to lower volumes of advanced biofuel using the cellulosic waiver authority in circumstances where advanced biofuels could not make up for the cellulosic shortfall: when there is inadequate projected production of non-cellulosic advanced biofuels, or where constraints exist—such as distribution or infrastructure constraints—that would limit the actual use of such fuels by consumers. 80 Fed. Reg. at 77,434. For past or nearly-past compliance years 2014 and 2015, EPA calculated the volumes of

advanced biofuel based on the number of advanced biofuel RINs actually generated and available for compliance, plus a projection for the remaining three months of 2015 for which data was not available. Id. at 77,439. For 2016, EPA analyzed production, import, and distribution constraints—as well as public comments addressing these and other factors—to project the reasonably attainable level of advanced biofuels. Id. at 77,476-79.

EPA used its cellulosic waiver authority to lower the advanced biofuel volumes to 2.67 billion ethanol-equivalent gallons for 2014, 2.88 billion ethanol-equivalent gallons for 2015, and 3.61 billion ethanol-equivalent gallons for 2016. Id. at 77,422, Table I-1. These reductions are within the amount permitted under the cellulosic waiver authority (i.e., less than the amount that EPA reduced the cellulosic biofuel volumes) and continue to result in growth of advanced biofuels by approximately 1 billion gallons across the three compliance years. See id.

Pursuant to the cellulosic waiver provision, EPA then also lowered the total renewable fuel volumes by the same amount. Id. at 77,434. Even with the reduction obtained with the cellulosic waiver authority, however, EPA determined that the resulting total renewable fuel volumes could not be achieved. EPA therefore relied on its general waiver authority to provide an additional reduction in total renewable fuel volumes for each year based on a finding of “inadequate domestic supply.” Id. at 77,435; 42 U.S.C. § 7545(o)(7)(A)(ii).

In considering whether to use the general waiver, EPA interpreted the phrase “inadequate domestic supply” for the first time. 80 Fed. Reg. at 77,435. After considering the statutory text, structure, and purposes of the RFS program, EPA determined that the most reasonable way to interpret the phrase was “to encompass the full range of constraints that could result in an inadequate supply of renewable fuel to the ultimate consumers,” including constraints affecting the ability to produce or import qualifying fuels and the ability to distribute, blend, and consume such fuels in vehicles. Id.

Applying this interpretation, EPA analyzed the maximum achievable total renewable fuel volume that could be made available to the ultimate consumer “under real world conditions, taking into account the ability of the standards to cause a market response and result in increase in the supply of renewable fuels.” Id. at 77,449. This calculation for 2014 and 2015 was based on EPA’s assessment of actual total renewable fuel RINs generated and available (plus a projection for the remainder of 2015 where data was not available). Id. at 77,445-48.

For 2016, EPA analyzed the potential for growth in three broad categories of renewable fuel—ethanol, biomass-based diesel, and other types of renewable fuel—taking into account constraints on the supply of those fuels for use by consumers, such as infrastructure and distribution constraints, as well as public comments on these issues. Id. at 77,457-75. EPA concluded that the volumes of

total renewable fuel calculated using the cellulosic waiver were still out of reach. Id. at 77,444. Accordingly, EPA further lowered the total renewable fuel volumes under the general waiver authority, for final volume requirements of 16.28 billion gallons for 2014, 16.93 billion gallons for 2015, and 18.11 billion gallons for 2016. Id. at 77,422.

In setting both the advanced biofuel and total renewable fuel volumes, EPA also considered whether it should decline—as it has done previously—to reduce the statutory volumes under the cellulosic and general waiver authorities based on the bank of “carryover” RINs available for compliance. Id. at 77,482-87. EPA ultimately determined that, at most, 1.74 billion carryover RINs would be available for compliance with the 2014-2016 standards—significantly less than the amount available in prior years. Id. at 77,483. EPA explained that to retain the statutory volumes based on the existence of carryover RINs in these years would result in complete drawdown of the carryover RIN bank. Id. at 77,485-86. This would deprive obligated parties of necessary compliance flexibility and negatively impact the liquidity of the RIN market and functionality of the RFS program. Id. at 77,483-87. Based on these and other considerations, EPA declined to set the volume requirements at a level expected to result in a drawdown on the carryover RIN bank.

ii. Biomass-Based Diesel Volumes

The Rule also set the biomass-based diesel volumes for 2014, 2015, 2016, and 2017. *Id.* at 77,430. For all of these years, EPA missed the statutory deadline to promulgate biomass-based diesel volumes 14 months before the year in which the volumes would apply.⁵ 42 U.S.C. § 7545(o)(2)(B)(ii); 80 Fed. Reg. at 77,430. EPA acknowledged the lateness of its determination, but explained that the statute requires EPA to set the volumes, even if late. 80 Fed. Reg. at 77,430. EPA further explained that it was exercising its authority reasonably by setting 2014 and 2015 volumes equal to actual production (and projected actual production for months for which data was not available), and setting 2016 and 2017 volumes at levels that achieve only modest incremental increases over prior year requirements. In doing so, EPA considered the importance of the late rules to the biomass-based diesel industry, the impact of other standards on compliance with the nested biomass-based diesel volumes, compliance flexibility options available to obligated parties that could mitigate burdens associated with the Rule's timing, and notice to the parties, and extended compliance deadlines in the Rule. *Id.* at 77,430, 77,490-92.

iii. RFS Point of Obligation

Finally, as in past rulemakings, EPA did not propose to revisit the Point of Obligation Regulation designating refiners and importers of gasoline and diesel

⁵ EPA missed the deadline for 2017 by a month.

fuel as obligated parties. See 80 Fed. Reg. at 33,105-08. Several obligated parties suggested in comments that EPA could require greater renewable fuel volumes by changing the point of obligation. 80 Fed. Reg. at 77,431. EPA responded that “these issues are beyond the scope of this rulemaking. However, we will continue to actively monitor the functioning of the market, assess all relevant data, and review our options as necessary.” Id. at 77,431; see also EPA-HQ-OAR-2015-0111-3671 at 883, JA__ (“EPA did not propose any changes to the definition of an obligated party, nor did we specifically seek comment on this issue.”).

In separate proceedings, several of the obligated party petitioners filed petitions with EPA requesting revisions to the Point of Obligation Regulation. EPA recently proposed to deny these petitions and opened a 60-day period for public comment. 81 Fed. Reg. 83,776 (Nov. 22, 2016).

C. Petitioners’ Challenges to the Rule

Petitioners in these consolidated cases broadly argue that the renewable fuel volumes in the Rule are either too low or too high, or should not apply to them at all. They specifically challenge: (1) EPA’s interpretation and use of its cellulosic waiver authority to lower advanced biofuel volumes for 2014 through 2016 (NBB); (2) EPA’s interpretation and use of its general waiver authority to further lower total renewable fuel volumes for 2014 through 2016 (ACEI Petitioners); (3) the methodologies and analyses used in setting the 2016 volume requirements for

advanced biofuel (NBB) and total renewable fuel (ACEI Petitioners); (4) the methodology used to project 2016 production of cellulosic biofuel (API, AFPM, and Monroe Energy); (5) promulgation of biomass-based diesel volumes for each year from 2014 through 2017 (API, AFPM, and Monroe Energy); and (6) the absence of a reconsideration of the Point of Obligation Regulation in the Rule (Obligated Party Petitioners, excluding API). These challenges are without merit, and the petitions should be denied.

STANDARD OF REVIEW

Under the CAA, the Court may reverse EPA's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(1)(E), (d)(9)(A), (C). This standard is narrow, and the Court does not substitute its judgment for EPA's. Bluewater Network v. EPA, 370 F.3d 1, 11 (D.C. Cir. 2004). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1160 (D.C. Cir. 1980) ("That the evidence in the record may also support other conclusions, even those that are inconsistent with the [EPA] Administrator's, does not prevent [the court] from concluding that h[er] decisions were rational and supported by the record."); Mississippi v. EPA, 744 F.3d 1334,

1348 (D.C. Cir. 2013). This Court gives an “extreme degree of deference” to EPA’s “evaluation of scientific data within its technical expertise,” especially “EPA’s administration of the complicated provisions of the Clean Air Act.” Miss. Comm’n on Env’tl. Quality v. EPA, 790 F.3d 138, 150 (D.C. Cir. 2015). “The task of the reviewing court is to apply [this] . . . standard of review to the agency decision based on the record the agency presents to the reviewing court.” Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) (internal citation omitted).

Questions of statutory interpretation are governed by the familiar two-step test set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984). Under step one, the reviewing court must determine “whether Congress has directly spoken to the precise question at issue.” Id. at 842. If Congress’ intent is clear, the inquiry ends. Id. at 842-43. If the statute is silent or ambiguous, step two requires the Court to decide whether the Agency’s interpretation is based on a permissible construction of the statute. Id. at 843. To uphold EPA’s interpretation, the Court need not find that EPA’s interpretation is the only permissible construction, or even the reading the Court would have reached, but only that EPA’s interpretation is reasonable. Id. at 843 n.11; Chem. Mfrs. Ass’n v. NRDC, 470 U.S. 116, 125 (1985).